Supreme Court, U.S.
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91-1907

NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

January Term 1992

In re.:
Patricia Rose Rabida,
Petitioner

v.

Joseph B. Van Orden, Jay Van Orden, Stoye Milburn, Charles Mc Gowan III, Kent Wardell, Alfred O. Knapp, and Russell J. Knapp et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA STATE COURT OF APPEAL FOR THE FIFTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

Patricia Rose Rabida
5425 Shoup Ave.
Woodland Hills,
California. 91367

(818) 704-6772

(VERIFICATION - 446 and 2015.5 C.C.P.)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, the unaersigned, declare: I am the Petitioner

in the above-entitled action; I have read the foregoing Writ of Certiorari

and know the contents thereof; and the same is true of my own knowledge, except as to the matters which are therein stated upon my information and belief, and as to those matters, I believe it to be true.

I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

MAY 19, 1992
Date

Patricia Rose Rabida
Signature of Declarant

Patricia Rose Rabida
Type or Print Full Name of Declarant and Title, if applicable

(PROOF OF SERVICE BY MAIL - 1013a, 2015.5 C.C.P.)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of/employed in the aforesaid county, State of California; I am over the age of eighteen years and not a party to the within action; my business address/residence address is: 9650 Sepulveda Blvd. Sepulveda Ca. 91343

On May 19, *19* 92 *I served the foregoing* Writ of certiorari
(set forth the exact title of the document served)

on interested parties

in this action by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Van Nuys Ca., *California, addressed as follows:*

see attached list.

I certify (or declare), under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

May 19, 1992
Date

John H. Sallach
Signature of Declarant

John H. Sallach
Type or Print Full Name of Declarant

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BEST AVAILAB

Writ of Certiorari mailed to:

Hon Brown,Court of Appeal,Fifth District,
P.O.Box 45013, Fresno Ca. 93718.

Hon. John M.Nairn, Superior Court,1415 Truxton Ave.
Bakersfield Ca.93301.

Hon. John M.Stanton, County Counsel's Office,
1415 Truxton Ave. Bakersfield Ca. 93301.
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Harry M. Reynolds, attorney at law, 1206 L. Street,
Bakersfiled Ca. 93301.
attorney representing the following:
Joseph B. Van Orden,
Jay Van Orden.
Charles Mc Gowan.
Alfred O. Knapp.
Russell P. Knapp/
Kent Wardell.

The above were put in the U.S. Mail with first class
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QUESTIONS PRESENTED FOR REVIEW

1. Has the state court taken defendant's land and given it to six other private individuals without Due Process ?
2. Was the judgment obtained by Fraud, Corruption, Misconduct, Duress and Excess of Jurisdiction on the part of Hon. John M. Stanton, Hon. John M. Nairn, Hon. Brown of the Fifth District, attorneys Harry M. Reynolds, Virgil Roberts Jr.,and Howard Manning et al.
3. Were all neccessary elements satisfied relating to creation of easements over the private land of another.
4. Is there evidence of Evidence Tampering by the officers of the court and/or by the court itself i.e. Hon John M. Nairn, attorney Harry M. Reynolds, et al.?
5. Did attorney Harry M. Reynolds attempt to influence Judge John M. Nairn ?
6. Was Reynolds successfully in influencing Judge John M. Nairn ?

7. Was the complaint fraudulant ?

8. Was there a conflict of interest between attorney Harry M. Reynolds who prepared the complaint and Joseph B. Van Orden who verified the Complaint and then litigated the case in the absence of real parties in interest and/or the the other plaintiffs ?

9. Does the record evidence a conspiracy between Robert C. Monroe, his agent Stoye Milburn and his agent's friend and former associate Joseph B. Van Orden; which originated prior to defendant's acquisition ?

10. Is Harry M. Reynolds, guilty of subordination to perjury ?

11. Is Joseph B. Van Orden guilty of Fraud, Deceit and/or Perjury.

12. Is defendant's testimony uncontroverted and substantially supported by direct evidence, credible exhibits,

expert testimony and the preponderance of evidence ?

13. Is defendant entitled to judgment on the complaint ?

14. Is defendant entitled to judgment on the Cross-complaint ?

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NO._____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

January Term 1992

In re.:
Patricia Rose Rabida, Petitioner

v.

Joseph B. Van Orden, Jay Van Orden, Stoye Milburn, Charles Mc Gowan III, Kent Wardell, Alfred O. Knapp, and Russell J. Knapp et al.,Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA STATE COURT OF APPEAL FOR THE FIFTH DISTRICT

1(d) The State Supreme Court denied Petition for Review on Nov. 20, 1991.

1(e) Jurisdiction of U.S. Supreme Court is invoked pursuant to Title 28 USC # 157..

State Court has taken title to real property rights from one party and given it

to the six other parties without Due Process. Judgment obtained by fraud,duress, and misconduct on part of officers of the court, and of the court itself.

Petitioner, Patricia Rabida, respectfully prays that a writ of certiorari issue to review the Sept. 5, 1991 Opinion of the 5th District Appellate Court appearing in Appendix A herein.

Denial of rehearing was filed Sept 27,1991.

(iv) STATUTORY PROVISIONS BELIEVED TO CONFER ON THIS COURT JURISDICTION TO REVIEW JUDGMENT

Fed. Rules Civ. Pro.Rule 60(b) 28 USCA 4. Rule permitting party to file motion to be relieved from a final judgment for fraud, misrepresentation, or other misconduct of adverse party is intended as relief from injustice of allowing a fraudulant party to hide behind the protective shield of doctrine of res judicata. (In Petition of Devlas 31 F.D.R.130 (1962)

In Laverty v Cochran (1937) 271 NW 354, 2,Constitutional Law #67: "Judicial Power" within constitutional provisions for separation of governmental departments and vesting judicial power in courts, is authority to hear and determine controversies as to rights and render judgments binding on disputants on such determina-

tions. (Const. art 2 #1; art 5 #1)

#448 Constitutional Law 16 A C.J,S. pg. 462: "A Court may not engage in any activity which deprives a party before it of his constitutional rights. (U.S. in Re. Baldinger D.C. Cal. 356 F Supp. 153)

"Constitutional Rights cannot be made dependent on favor of the court, but may be asserted as a matter of right." (People v Humphreys 187 NE 446, 353 Ill. 340; People v Bagdanoff 171 NE 890, 254 NY 16, 69 A.L.R. 1378; State v Vouse 264 P2d. 800. 805, 199 Or. 676.)

"---and in matter of safeguarding these constitutional rights the court looks to substance, rather than to technical forms of procedure taken to invoke the protection of the law." (Dickoff v Dewell 9 So.2d. 804, 152 Fla. 240; Smith v U.S. CA Tex. 502 F2d 512; Kenai v Kenai 590 P2d 437)

2 Appeal & Error 170(2) "Supreme Court will hear constitutional questions not raised below where consideration of such question is central to a correct resolution of the controversy and justice requires consideration of the question." (Meeker v Meeker 1967;243 A2d 801)

#450 Constitutional Law 16A C.J.S. Pg.463: "The denial or violation of a constitutional right is not justified--because the degree of such invasion is minor." (U.S. Citizens-Sep. of Church & State v. City of Denver D.C. Colo. 481 F.Supp. 522)

Constitutional Law C. Judicial Powers and Functions #169:"The primary responsibility of an oderly administration of justice and the protection and enforcement of

constitutional rights rests ultimatly with the courts and they cannot disclaim the power to do what is neccessary to accomplish these ends.---The judicial function of declaring what the law is requires that constitutional provisions ,including the Bill of Rights, be given full force and effect." (Briston v. Cheatham 255 P2d 173, 75 Ariz,227; Corpus Juris Secundum 16, 538-542)

#446 C.J.S. Constitutional Law pg. 459: "The Bill of Rights guarantees the preservation of our natural rights against invasion of the government or any branch thereof."

Ex Parte Rhodes 79 So.462,202 Ala.68, 1 Ala. 68, 1 A.L.R. 568 is informative on the holdings of the Bill of Rights. J. Mayfield's Opinion held:"These phrases (Due Process) are limitations upon the power of the legislature as well as upon that of the other departments of government, and their officers,"(emphasis added) J. Manfield quotes the Bill of Rights as:"Sec. 35. that the sole object and only ligitimate end of government is to protect citizen in the enjoyment of life, liberty,and property, and when the government assumes other functions it is usurpation and oppression."
"The constitutions, state and federal,, in several provisions or clauses not only declare but guarantee that no citizen shall be deprived of his life liberty, or property except by Due Process of Law."
"It was within the contemplation of the makers of the Constitution that the legislature should be the judge of what is due process of law, and that due process of law is secured by the laws, operating upon all alike, and not subjecting

individuals to the arbitrary exercise of the powers of the government."

"The Order of the Court of appeals, based upon an investigation in which the fundamental rules of evidence were, at the court's direction, wholly disregarded, deprived the petitioner of its property without Due Process of law." (Universal Oil Products Co. v Root Ref.Co.;328 US 575-581)

"The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question." (Hazel-Atlas Glass Co. v Hartford-Empire Co 322 US 238, 88L ed 1250, 64 S Ct.997 quoted in Uni. Oil Products Co. v Root Ref. Co. 328 US 575-581)

In Re. Baldinger 356 F.Supp. 153 (1973) Opinion held:10."A Court may not engage in any action which deprives a party of his constitutional rights. 6. Statutes #188:
"When a statute uses plain understandable words, the court cannot legislate but must interpret words as they read without modification."

"The Constitution of the United States is an original, written, Federal, and social compact, freely and voluntarily entered into by the several states and ratified by the people, and the Federal Government is bound by that constitution to every citizen of the United States."
Chief Justice Brown in an appeal from the District Court of the U.S. held:"Nothing is better settled than that statutes should receive a sensible construction such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust and absurd conclusion"

(Hawaii v Menkichi 47 L.Ed. 1021 (1902)

In Re. Baldinger 356 F.Supp. 153 (1973 "It has been held on more than one occasion by the Supreme Court that if a literal interpretation of any part of a statute would operate unjustly, or lead to absurd results, or be contrary to evident meaning of the act taken as a whole. it should be neglected. Heydenfeldt v Daney Gold etc.Co. 93 U.S. 634, 638, 23 L.Ed. 995; Hawaii v Mankichi 190 U.S. 197, 213, 23 Sup.Ct. 787, 47 L.Ed 1016. such undoubtly is the rule, and we should unhesitatingly follow it in any case to which it applied.".(Merchant's Nat.Bank v U.S. 214 F. 204 (1914))

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. ------."
"---the books are full of authorities to the effect that the intention of the lawmaking power will prevail, even against the letter of the statute;---The intention of the lawmaker is the law---Mr. Chief Justice Thompson--in People v Utica Ins. Co. 15 Johns 358, 381, 8 Am.Dec.243:"A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers." (Hawaii v Mankichi (1902) 190 U.S. 197,213,23 Sup. Ct. 787, 47 L.Ed. 1016)

Constitutional Law #169 C.J.S. 16,543:
"The Courts are duty bound to apply not only what the Constitution expressly states, but also what by neccessary implication

from the values on which it is based, the Constitution implies; in doing so, the courts must recognize their duty to apply the law free of emotion and of predilection." (Lovisi v Slayton D.C. Va 363 F. Sup.620 affirmed 539 F2d 349 certiorari denied 97 S Ct. 485,429 US 977, 50 L.Ed.2d 585)

Seaboard Sys.RR Inc v Clemente 467 So.2d 348 (Fla.App.3 Dist.(1985) 6 Statutes #190: "Where language of a statute clearly and unambiguously conveys legislative intent, it is unnecessary to resort to statutory construction, and courts should not depart from the plain language employed by legislature."

U.S.C.A. Art.6 cl.2:"No court, state or federal, may serve as an accomplice in the willfull transgression of federal laws by which judges of every state are bound, (Lee v State of Fla.1968, 88 S.Ct. 2096)

1. United States #120: "If a Plaintiff practices a fraud in prosecution or proof of his case in court of claims, he forfeits his claim no matter how meritorious his claim might otherwise have been, or how supererogatory may have been his attempted fraud." (Haggar Co. v. The United States (1955)128 F.Supp. 404)

8. Equity #65(1); "He who comes into equity must come with clean hands and keep them clean throughout the course of litigation,and if he violates the rule he must be denied all relief, whatever may have been the merits of his claim."

10.Attorney and client #42: "An attorney who attempts by personal influence to control a judge or jury in their decision in pending case or who merely holds himself

out as able to do so whether or not he actually makes the attempt and whether or not he succeeds or fails in attempt, is ejected from the courts and ceases to exist as a lawyer." (Root Refining Co. v Universal Oil Products Co. 169 F.2d 514)

American Law Institute, Restatement of the Law, Judgments 2d,#70, Ch.5, pg.180: "--- it is equally inappropriate that all judgments be treated as absolutely invioble. Particularly is this true when a judgment has been procured by the fraud of the successfull party. To immunize such a judgment from attack is to compound the injustice of its result on the merits with the injustice of the means by which it was reached. Equally important, if judgments were wholly immune it would give powerful incentive to use of fraudulant tactics in obtaining a judgment. A litigant would know that if he could sustain duress or deception through the moment of finality, the benefit of the judgment would be his forever." (emphasis added)
Bribery or duress:"When a judgment is shown to have been procured by the prevailing party through corruption of the tribunal, or of the attorney for the party against whom the judgment was rendered, no worthwhile interest is served in protecting the judgment."

Constitutional Law Section 1 of article 3 provides:"The judges, both supreme and inferior courts shall hold their offices during good behavior."

#1429 "Constitutional Law 16D C.J.S.687: The constitutional guaranty providing for open courts and insuring remedies for injuries gives a remedy for arbitrary and unreasonable exercise of power."

1.Constitutional Law #87; Protection of one's right to own property is one of the most important purposes of the government; right has been described as fundamental, natural, inherent, inalienable, not derived from legislature and as preexisting even constitutions.(16 A C.J.S. #506 quoted in Eggemeyer v. Eggemeyer 554 S.W. 2d 137; 5 Constitutional Law #87)

6 Constitutional Law # 278(1) Court held: "Constitutional guarantee of Due Course that protects citizens from deprivation of their property by state requires not only procedural but also substantive due course," (Eggemeyer v Eggemeyer (Id))

The right to private property "is a common law right, which existed before the adoption of the federal and state constitutions and is not now dependent on them for it's existence---However, to insure their continuance, property interests are guaranteed by the federal and by various state constitutions." (16A C.J.S. #506)

Newland v Child 254 P2d 1066; "The right to own and enjoy private property is fundamental, and is one of the natural, inherent and inalienable rights of free men, which preexisted constitutions," (Const. art.1 ## 1, 13; I.C. #56-224a.)

505 constitutional Law 16 A C.J.S. 604-605: "The right to the pursuit of happiness is one of the inherent, natural, inalienable rights applicable to all citizens and as one of the purposes for which government is organized, is protected by it's incorporation into the various constitutions.--The pursuit of happiness embraces the idea of the aquisition and use of private property." (Goldring v Schubach Optical 70 P2d 871m 93 Utah 32)

5. Constitutional Law # 86,87: "Constitutional guaranty of right to pursue and obtain happiness and safety and property is violated when one is not at liberty to contract with others respecting the use to which he may subject his property, or the manner in which he may enjoy it" (Const. art 1,#1)" (Stimson Mill Co. v. Braun, 136 Cal. 122, 68 P.481,57 L.R.A.726, 89 Am.St. Rep. 116 quoted in Goldring v Schubach Optical (Id))

Constitutional Law #506, 16A C.J.S. 608-609: "Under constitutional provisions, no person can be deprived of his property except by his own consent, or the law of the land, or except for very urgent reasons." (Smith v Keator 206 S.E.2d 203, 285 N.C. 530 appeal dismissed 95 S.Ct.613,419 U.S. 1043, 42 L.Ed.2d 636)

Constitutional Law #506, 16A C.J.S. 610-611:"The guarantee embraces the right to acquire, possess, use, enjoy, protect, improve, as by the erection and construction of building, lease, and dispose of, or not dispose of, property." (Equitable Sav. & Loan Ass'n v. Sup. Ct. L.A. County.)

3.Judgment #443(2) "Conduct of chief attorney for plaintiff, in action for injuries sustained in automobile collision in conspiring with ostensibly disinterested witness who did in fact not see the accident to give false testimony as to cause of collision and in using such testimony to obtain verdict for plaintiff, amounted to a fraud on the court for which equity should grant relief by setting aside judgment entered on such verdict,
Sutter v. Easterly 189 S.W.2d 284.

4.Judgment #444 "Where an attorney conspires to commit a fraud upon the court by

production of fabricated evidence and by such means obtains judgment, enforcement of the judgment becomes manifestly unconcionable and equity may set it aside." Sutter v. Easterly 189 S.W.2d 284.

"---When a party asserts what he knows to be false, or does not know to be true, to another's loss, and to his own gain, is guilty of a fraud; a fraud in fact,, if he knows it to be false,a fraud in law, if he does not know it to be true....We are clearly of the opinion, that the defendant cannot be heard to say, that what was asserted at a former trial was false, even if the assertion was made by mistake, If it was a mistake, of which there is no evidence, it was one made by the defendant, of which he took the benefit, and the plaintiff the loss, and it is too late to correct it."(Philadelphia, W & B. R.Co. v Howard 54 U.S. 13 How. 307 (14:157) quoted in Davis v. Wakelee, Supreme Court of U.S., 39 L.Ed. pg 585)

"It may be laid down as a proposition that, where a party assumes a certain position, in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." (Davis v. Wakelee U.S.Supreme Court 39 L. Ed. 584)

"Where a party gives a reason for his conduct, and decision touching anything involved in the controversy, he cannot, after the litigation has begun change his ground, and put his conduct upon another and different consideration. He is not permitted thus to mend his hold." (Ohio & M.R. Co.v. Mc Carthy,96 U.S. 258 (24;693 quoted

in Davis v. Wakelee (Id); see also Hayward v Duff 12 C.B.N.S. 364 & Exparte Mitchell 1 De Gex B.Cas 257)

Constitutional Law #448; 16 A.C.J.S. .461: "The Courts must ever be watchful to protect the personal rights guaranteed by state and Federal Constitutions. (Byars v U.S. Iowa 47 S.Ct. 248. 273,U.S. 28, 71 L.Ed. 520)

U.S. Byars v. USA (Id). Constitutional law construction-protection of rights (5); "Constitutional provisions for security of persons and property are to be liberally construed, and it is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachment thereon."

Failure to Follow Statutory Procedure: "When a statute authorizes a prescribed procedure and a court acts contrary to this authority, it has exceeded it's jurisdiction and a Writ of Review will lie to correct the excess," (Mitchell v Sup. Ct.(1972) 28 Cal. App.3d 759, 762, 104 Cal.Rptr. 921)

Non-Existence of Jurisdictional Facts: "When an inferior tribunal has power to act on certain facts, and there is no evidence whatever to show the existence of those jurisdictional facts, the Court will annul the decision or judgment below." (Great Western Power Co. v. Pilsbury (1915) 170 Cal.180,185,186,191,149 P 35)

"Any acts that exceed the power of a court, whether that power be defined by the constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of Stare Decisis, are in excess of jurisdic-

tion." (Albelleira V. District Court of Appeals (1941) 17 Cal.2d 280,291,109 P2d 942)

Refusal to Follow Stare Decisis:" The scope of review for lack or excess of jurisdiction was greatly expanded in the leading case of Auto Equity Sales Inc. v Sup. Ct. (1962),57 Cal.2d 450,454,456,620 Cal. Rptr. 321,369 P2d 937 in which the court issuing a Writ of Review, held that appellate department of Sup. Ct. exceeded it's jurisdiction by failure to follow a clear, binding precedent, laid down by a higher court. The court stated that the rule of stare decisis is a rule of jurisdiction for the purposes of a writ of review,

Fraud by officers of the court, or by the court itself, has long been recognized as a ground for relief."Rule 60 (b); 60 Cal. L.R. 553-554.

(f) STATUTES, CONSTITUTIONAL PROVISIONS, CODES ETC.INVOLVED IN CASE

"An easement may be created by implication, in favor of a grantor or a grantee, and can be made only in connection with a conveyance." (Orr v Kirk 100 CA2d 678, 224, P2d 71; Warfield v Basisch 161 CA2d 493, 326 P2d 942)

"Original unity of ownership of the dominant and servient parcels must be pleaded and proved. This prevents a finding of such easement in the land of a third person, who is a stranger to the claimant's title." (Powell on Real Property, Abridged Ed. Powell & Ruban, 545)

As pointed out in (Mc Donald v Mc Elroy (1882) 4 Kent's Com. 473,p. 489) quoting (Lawrence v Montgomery, 37 Cal.183, 188) "The absence of a road is fatal to Plaintiff's action for right-of-way."

CCP 3530:"One of the maxims of Jurisprudence is; That which does not appear to exist is to be regarded as if it did not exist,"

"Triable issues of fact must be resolved before it can be determined whether appellant(s) had such an easement..."
(Franson ,Acting P.J.; George v Goshgarian 189 Cal. Rptr. 95 (1983)
(See also CCP 437(c))

28 Cal.Jur.3d P 53, 3 By Implication (7)
(See also 3 Witkin Summary of Cal. Law (8th Ed. 1973)Real Property #355 p. 2052)

Kosich v Braz (1967) 56 Cal.Rptr.54 (4,5) "It is true that a purchaser of real property in fee takes the property subject only to the servitude which he knows or

should know. (Pollard v Rebman 162 Cal. 633, 634-635, 124 P 235; Amerco Inc. v Tullar, 182 Cal. App.2d 336, 338, 6 Cal. Rptr.6,9)

"A purchaser of land for value,takes subject only to interest in the land of which he has actual notice or which appears on the record. The rule applies to easements as to claims of greater interest."(Mesmer v Uharriet (1916) 174 Cal. 110, 162 P 104)

(C.C.Sec. 1104 (19 Cor. Jur. 917) in (Kytasty v Godwin (1980) 162 Cal Rptr.561 (4-5);102 Cal.App.3d 727).

Orr v Kirk(1950) 100 Cal. App.2d 678, 681,224 P2d 71 (4): (28 C.J.S. 686 #30) (Fristoe v Drapeau 35, Cal.2d 5, 8, 215 P2d 729)

(Navarro v Pulley 66 CA 2d 827,153 P2d 397;Piazza v Schafer 255,CA2d 328,63 Cal. Rptr. 246)(County of L.A. v Bartlett 203, CA2d 523, 21 Cal.Rptr 776)

"The elements necessary to create a 'quasi easement' or grant by implication, upon severance of unity of ownership in the estate, are:
(1) a separation of title.(which implies unity of ownership at some former time as the foundation of the right...."
(Orr v Kirk (1950) 100 CA2d 678, 681)

Lampman v Milks 21 N.Y. 505 at 507:"... but the moment severance occurs, by the sale of a part. the right of the owner to redistribute properties of the respective portions ceases; and easements or servitudes are created corresponding to the benefits and burdens existing at the time of sale."(Rosebrook v Utz 45 CA2d 729 (1941) Alameda County)

(Wilson v Abrams 1 CA3d 1030, 82 Cal.Rptr. 272; Gagnon v Adamson 122 CA2d 678, 224 P2d 71) (See also; (Orr v Kirk(Id.) 71-73) (Kytasty v Godwin (1980) 102 Cal.App.3d 72;162 Cal.Rptr.561-563)

(Joseph v Ager, 108 Cal.517. 520-521,41 P 422; Crimmins v Gould 149 Cal.App.2d 383, 390-392, 308 P2d 786).(Kytasty v Godwin (1980)162 Cal.Rptr,562-563)

"The purpose of the doctrine of implied easements is to give effect to the actual intent of the parties as shown by all the facts and circumstances ..Among these circumstances is the use which is being made of the dominant tenement at that time." (Orr v Kirk (1950) 100 CA2d 678, 681; 224 P2d 7)

"Upon the sale or division of title of realty, an easement arises by implication because of the owner's prior existing use of his property was of such a nature that the parties must have intended or believed that the use would continue.."(Miller v Starr, Current Law of Cal. Real Estate, 3 easements, 304-305; Leonard v Haydon (1980) 110 Cal.App.3d 263; 167 Cal.Rptr. 789)

George v Goshgarian (1983) 189 Cal.Rptr, 94, 1 Easements 15:"Before the law will recognize easements by implication, utilization of easement must be apparent and continuous at time dominant owner acquires his land."(West Ann.Ca. Civ. Code. 1104)

"Specific intent may be proved by circumstantial evidence." (People v Stevens (1959) 345 P2d 582, 175 CA2d 123)

"Where party relies on a pre-existing use to establish an easement by implication,

the easement created is one consistent with the manner and extent of such use as of the time of the conveyance." (Laux v Freed (1960) 53, Cal2d 512, 2 Cal.Rptr, 265)

Felsenthal v Warring 40 Cal.App.119, 131, 180 P 67;(Tarr v Watkins 4 Cal.Rptr. 203)

Kreiger v Pacific Gas,(1981)119,Cal.App3d 145,755-756;Whalen v Ruiz (1953) 40 Cal. 2d,294,300,253, P2d 457;(Burris v People's Ditch Co. (1894) 104 Cal. 248, 252,137 P 22; Brown v Radcliff (1913) 21,Cal.App.282, 131 P 769; White v Walsh (1951) 105 Cal. App.2d,828,234,P2d 276)

"A finding that a prescriptive easement is 14½ wide instead of 14 feet 2 inches, as alleged, will be modified to conform to the allegation and to stipulated evidence." (Wallace v Whitmore 47 CA2d 369, 117 P2d 926)

"When a decree is sought to the effect that real property is subject to a use or easement in favor of another, the portion of property affected must be described in the Pleadings with such certainty as to enable the party against whom the claim is made to know exactly what portion of his property is claimed." (2 Cal.Jur. 3d 107)

(Guerra & Packard 236,CA2d 272, 46 Cal. Rptr.25, 99.8: Langazo v San Joaquin Light and Power Co. 32 CA2d,678, 90 P2d 825; L.A. v. Howard 244 CA2d 538, 53 Cal.Rptr. 274)

"When matters of action concern real property, the cause of action follows the real property itself, not the owner at the time the cause arose, and the successor in interest inherits whatever cause of action

existed at the time he takes title." (Lord v Morris (1861) 18 Cal. 482, 491)

CCP 1856(a):"Terms set forth in writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement."

(Morrison v Wilhoit (1944) 145, P2d 707, 62 CA2d 830)

"One comming into equity has burden to show his hands are clean."(Richman v Bank of Perris (1930) 282 P 801, 102 CA 71)

"Action to enforce private rights must be in name of real party in interest, except as provided to contrary by statute." (Wiggans v Mc Donald (1861) 18C 126)

CCP 367: 1(Space Properties Inc. v Tool Research Co. (1962) 22 Cal. Rptr.166, 203 CA2d 819; Kodota Fig. Assn.of Prod. v Case-Swaune Co. (1946) 167 P2d 518, 73 CA 2d 796; Kittner v. Shippy (1908) 96,P 912, 8 CA 342)

Jose v Pacific Tile & Porcelain Co. (1967) 58 Cal.Rptr. 881;6 Evidence 97, 596 (3): "Burden of proof to vary terms of a writ ten instrument is on party claiming contrary thereto and he must establish his allegations by preponderance of evidence."

"Grantor's declarations after delivery of deed are inadmissible to disparage it, (Ord v Ord (1893) 99 C 523, 34 P83; Bollinger v Bollinger (1908) 154 C 695, 99 P 196; Scholle v Finnell (1914) 167 C90, 138 P 746; Taylor v Brunnell (1926) 77 CA 525, 247 P 240)

"Parties are bound by their own Pleadings and cannot controvert their own averments." (Bradbury v Cronise (1873) 46 C 287)

"A judgment must be in accord and warranted by the pleadings." (Northern Ry Co. v Jordon 87 C 23, 25 P273)

"If there is to be any recovery, it must be based on the cause of action set forth in the complaint and not some other which may be developed by the proofs." (Burke v Levy 68 C 32, 8 P 527)

"Judgment establishing the validity of a claim to an easement must be definite and certain as to the property affected," (Laverone v Weakly 155, C.395, 101 P 304; Guerra v Packard 236 CA2d 272, 46 Cal. Rptr. 25)

"Property may be sufficiently described in a judgment by reference to land marks, material and artificial, whereby it may be identified as well by U.S. Survey. (De Supulveda v Baugh 74 C 468, 16 P 223)

"A judgment must be sufficiently clear and definite that a party may comply with it's requirements and that it may be enforced and constitute estopel between the parties." (Johnson v Farmer 41 CA2d 874,107 P2d 959, 108 P2d 945;Goatman v Fuller 191 C 245, 216 P 35)

"When a substantive fact upon which the cause of action, as stated in the complaint, is found against the plaintiff on sufficient evidence, the defendant should have the judgment." (Warren v Mould (1883)2 C.U. 163, 11 C.U. 163, 11 P.C.L.J. 152)

"If the existing of an essential fact on which the party relies is left to doubt and

uncertainty, party on whom burden rests to establish that fact should suffer, not his adversary." (Kuttler Estate (1960) 185 CA2d 189. 8 Cal. Rptr.16; Brautigan v Brooks (1964) 227, CA2d 547, 38 Cal.Rptr. 784)

"The defendant is entitled to directed verdict where evidence upon an essential element is lacking." (Atlantic Coast Line R. Co. v Temple 285, US 143, 76 L.Ed. 670, 52 S.Ct 334)

"It is essential that findings are made on every material issue raised by the Pleadings, including the issues raised upon affirmative defenses in the answer, A failure to do so constitutes reversible error." (Auer v Frank (1964) 227 CA2d 396, 406)

"Findings must be on all material issues." (Estate of Ramsey 107 Cal.App.2d 372, 375, 237 P2d 20, 22, 23 (1951))

"A finding cannot be based on guesses, surmise or conjecture." (Newhart v Pierce (1967) 62 Cal.Rptr. 554;Evidence Code #597)

CCP 909:"Findings based on Direct Evidence are binding on reviewing court."

Direct Evidence proves a litigated fact in a direct manner without the neccessity of inferences or presumption."(In re Mc Ginn's Estate (1889) 3 Cof 26; In re Blanc's Estate (1892) 3 Cof. 71)

"Direct Evidence means evidence that directly proves a fact without inference or presumption and which of itself, if true, conclusively establishes the fact." Stats 1965 C29 #411.

"Direct Evidence is evidence which if applied to the fact to be proven, proves that

fact immediately and directly, and without the aid of interveening fact or process." (People v Goldstein (1956) 293, P2d 495, 139 CA2d 146; People v Malbrough (1961) 10 Cal.Rptr. 632, 359,P2d 30, 55 C2d 249)

Evidence Code 1500(12) Title to land cannot be established by Parol Evidence.(Montijo v. Robert Sherer & Co. (1907) 92 P 512,6 CA 558)

"A letter is the best evidence of it's contents"(First Nat. Bank of Potterville v de Moulin (1922) 205 P 92, 56 CA 313)

"Best evidence of contents of a writing is the writing itself." (Div. of Labor Law Enforce. v. Stand. Oil Products Co. (1955) 228 P2d 637, 136 CA2d Sup. 919)

Evidence Code 200, Note 1,3
"Oral testimony which rests on the memory of witness is not as trustworthy as written or documentary evidence, and party seeking to establish fact contrary to written evidence must make out his case with more than usual clearness." (Keck v. Wingert (1933) 132 CA 475, 23 P2d 99)

"All evidence must be weighed according to proof which one party had power to produce and the other party the power to contradict." (People v Adamson (1946) 165 P2d 3, 27, C2d 478, affirmed 67 S.Ct.1672, 332, U.S. 46, 91 L.Ed 1903, 171 A.L.R. 1223)

Evidence Code 200, Note 1,3:"Clear and convincing evidence requires a finding of high probability, such test requires that the evidence be so clear as to leave no substantial doubt." (Lillian F. v Superior Court (Kretz) (App 1 Dist. 1984) 206 Cal.Rptr. 603, 160 CA3d 314)

Admissible Evidence:"The declarations must be on the personal knowledge of the declarant and affirmatively show that the declarant is competent to testify to the matters stated." (Fisher v Cheseman (1968) 260 Cal.App.2d 503, 506,67 Cal.Rptr.258)

"Substantial evidence means evidence which is of ponderable legal significance--evidence that is reasonable in nature. credible and of solid value." (H. Russell Taylor's Fire Prevention Service Inc. v Coca-Cola Bottling Corp. (1979) 99 Cal. App 3d 711, 726)

Best Evidence Rule #1:"Except as otherwise provided by statute, no evidence other than the original writting is admissible to prove it's contents." (Evidence C 1500)

"Where the language of the statute conferring the right is so plain and uniquivocal that it's meaning, intent, and purpose are in no particular manner rendered obscure or doubtful. the courts will require substantial compliance." (Rigby v Sup.Ct.94 c 354, 29 P 716; Pen. Code 1246,;Pen Code 1467)

"The presumption is always against the pleader and all doubts are resolved against him since it is presumed that he stated his case as favorably as possible to himself." (Feldsman v Mc Govern (1941) 112 P2d 645, 44 CA2d 566)

Rule 5:"All exhibits either admitted in evidence or rejected are deemed part of the clerk's transcript."

(Haun v Hyman (1963) 223 Cal.App.2d 620, 36 Cal, Rptr. 84)(Cyrus v Haverson (1976) 65 Cal.App.3d 306, 316, 135 Cal.Rptr.) (See also Samuelson v Ingram (1969) 272

CA2d 804-806)

"For purposes of Section 3294, 'malice' has been defined as the motive and willingness to vex, harrass, annoy or injure." (Beck v State Farm Mut.Auto. Ins.Co.(1976) 54 Cal.App.3d 347,126 Cal.Rptr.602;

"The attempt to manufacture or suppress evidence may always be proved against a party as showing a conciousness of guilt. (People v Downs (1953) 251 P2d 369, 1214 CA2d 758)

CCP 133 Enacted 1872.

Credibility of Witness:"Impeachment evidence goes to the credibility of a witness --" (D'Amico v Board of Med. Examiners (1974) 112 Cal.Rptr. 786; Leasman v Beech Aircraft Corp. (1975) 48 Cal.App.3d 376, 382, 121 Cal.Rptr, 768)

"Deceit, within section 1710(1) The suggestion, as a fact, of that which is not true by one who does not believe it to be true, Fraudulent representation requires 'scienter'. an intentional concious misrepresentation," (Hale v George A Hamel & Co. (1975) 121 Cal.Rptr. 144, 48 CA3d 73)

"A positive misstatement of fact by one in a position to know the truth is a 'fraudulent misrepresentation'" (Eck v Mc.Micheal (1960) 1 Cal.Rptr, 369, 176, CA2d 368)

"A reckless statement in a judicial proceeding which is not known to be true is 'perjury' if in truth such averment is false."(People v Agnew (1947) 176 P2d 724, 77 CA2d 748)

"Where a defendant willfully swears in a

judicial proceeding to a belief that a fact exists when at the same time he knows that it does not exist, he is guilty of perjury." (Id)

It is perjury for one to make a false statement in a pleading filed in a judicial proceeding." (Id);People v. Godines, 17 Cal.App.2d.721, 724, 62 P2d 787; People v Fink 118 Cal.App. 631,634, 5 P2d 641)

Penal Code 118, 118(a):"An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false." (People v Nelson 36 Cal.App.2d 515,97 P2d 1043)

"If a person wilfully swears to a belief in the existence of a fact which he knows does not exist he is guilty of perjury as if he had sworn directly to the existence of a fact which he knew did not exist." (People v Phillips, 56 Cal. App. 291,296, 205 P 40; In re Howell 114 Cal 250,254, 46 P 159; ,Cassidy v State 18 Okla. Cr. 568, 197 P 171, 172)

"It is not until the verified false statement of the accused leaves the hands of it's author that a wrong to another is committed and crime of perjury is complete." (People v Robles 117 Cal. 681, 684, 49 P 1042)

"Any allegation is material if the evidence what would establish the truth of it could have properly influence the court which tried the issues."
(People v Paustau 39 Cal. App. 2d 407,413, 103 P2d 224)

A&M Records, Inc. v Heilman (1977) App. 142 Cal..Rptr. 390 (11) Pretrial Procedure #45; "Accomplishment of purpose be-

hind discovery Act of 1957, to take the game element out of trial preparation and do away with surprise at trial..." U.S.C.A. Const. Amend. 5; West's Ann. Evid. Code #930)

In Nestle v City of Santa Monica Sup 101, Cal.Rptr. 568,6,Cal.3d 929, 573:"...but elimination of trial surprises is likely to produce a more salutary result."

CCP 389: Parties to Civil Actions 4. Powers and Duties of Court: "Court must order bringing in of parties whose presence is necessary to complete determination of controversy. (Curtis v Nye & Nissen (1927) 261 P. 747, 86 CA 507)

"It is a general rule that all neccessary parties should be represented and that party or parties whose acts are the subject of review should be before the court." (Lee v Small Claims Court 34 Cal App.2d 1,5 (92) by J. Griffin.)

"The wide discretionary powers vested in him are to be exercised so that abuses of justice shall not be accomplished under the forms of law.(Bruggerman v Illnois CR 147 Iowa 187, 123 NW 1007, Ann.Cas. 1912 B 876)

54;12 Misconduct of Judge (6); "A judge prejudging of an issue before receiving any evidence by one party and so violating the rule that a Judge should keep an open mind until all the evidence is presented to him."
(Weber v Weber 33 C2d 153, 199 P2d 934)

"Since judge's duties are of a judicial nature, he should not act as counsel for a party by raising objections which the party should make." (Allegre v Maryland

Ins. Co. 6 Harr & J. (Md.) 408, 14, Am. Dec. 289)

"Trial judge should be careful not to throw the weight of his judicial position into the case either for or against the defendant." (People v Byrd (1948) 198 P2d 561, 88 CA2d 188)

"A directing of a verdict for the Plaintiff solely upon the evidence supporting his theory of the case, while ignoring the supporting theory of the Defendant, is error." (Clinchfield Coal Corp. v Compton 148 Va. 437, 139 SE 308,55, ALR 1976)

"On motion to direct a verdict for the plaintiff, the inferences most favorable to the defendant must be drawn." (Citizens State Bank v Bowles 180, NY 346, 73 NE 33, 105 Am.St.Rep.765)

(Roth v Cottrell 112 CA2d 621, 246 P2d 958. (1952)):Id (1);Id 7(a);Id.(7(b);Id.(8) CCP 338(2)(Luellen v City of Aberdeen 20 Wn 2d 594, 148 P2d 819, 855) citing Words and Phrases Perm.Ed. 437; Ballentine Law Dictionary 650-652)

"If plaintiff is out of possession and seeks to recover possession by quiet suit, the action is legal." (So.Pac.Land Co. v Dickerson (1922) 188 C 113, 116, 204 P 576; Thompson v Thompson (1936) 7 C2d 671,681, 62 P2d 358)

"In order for the statutes to run against the owner of realty and in favor of adverse claimant, there must be definite and positive evidence of an adverse holding by the clearest and most satisfactory evidence. "(Furtado v Taylor (1948) 194 P2d 770, 86 CA2d 346)

CCP 3: Fraudulent concealment:"The statutes of limitations is not intended to protect persons who, by fraudulant concealment,has delayed the assertion of a right. (Kane v Cook 8 Cal. 449)

"The statutes of limitations begins to run against a suit to quiet title from the time defendant takes possession of her land." (Moore v Miller (CC 1890) 43 F 347)

Commencement of Actions:"This section providing that no entry on real estate is deemed sufficient or valid as a claim unless the action be commenced thereon within one year after making such entry, and within five years from the time when the right accrued." (Crane v French (1940) 104 P2d 53, 39 CA2d 642; CCP 320)

"Latches consist of unreasonable delay with prejudice to defendant," (L.A. Fire & Police Protective League v City of L.A. (1972) 23 CA3d 67, 74)

"It is beyond the jurisdiction of a court to make an order extending time to plead beyond limits that have been set by statute." (Thelander v Sup. Ct.(1962) 58 Cal.2d.811, 813 fn 3, 26 Cal.Rptr. 643, 376 P2d 571,(interpreting CCP 1054)

"If a grantor, subsequent to conveyance, holds continuous adverse possession of the premises for five years, he can set up statutes of limitations in defense of an action of ejectment by his grantee." (Franklin v Dorland (1865) 28 C 175, 87 Am. De. 111)

"The law helps the vigilant before those who sleep on their rights." (CCP 3527)

Superior Court Rule 229(c)(Refusing Pro-

posed Instructions):"Proposed Instructions, except those required by law, which do not comply --with law may be refused, in which event the judge shall endorse thereon the reason for the refusal." As amended, eff. April 1, 1962; July 1, 1988--.

CCP #608,Note 7, Theory of Case-In General: "Each party to an action has the right to have the jury instructed on all his theories of the case which are supported by the pleadings and evidence." (Ng. v Hudson (1977) 142 Cal.Rptr. 69,75,CA3d 250)

Valintine v Kaiser Hosp.(1961) 15 Cal. Rptr.26; 6 Trial #255 (2): "Defendant has no duty to propose instructions on plaintiff's theory of the case." 9 Trial #220: "Counsel has right to be told by court before commencement of oral argument, what instructions will be given.(West's Ann. Code Civ. Pro. #607(a).

Trial by Jury pg.502 #607(a):Proposed Jury Instructions:"In every case which is being tried before the court with a jury...the court, on request of counsel, must...(3) advise counsel of all instructions to be given,"(Added by Stats 1933,c.744,P 1874 #101; Stats 1951,c 1737, p. 4115,#89, operative Jan.1, 1952; Stats 1957,c 1698, p.3073 #1)

Superior Court Rule 230, Requests for Special Findings by Jury:"Whenever a party desires special findings by jury, he shall, before argument, unless otherwise ordered, present the judge in writting the issues or questions of fact upon which such findings are requested, in proper form for submission to the jury, and serve copies thereof upon all other parties."

Trial by Jury #607 (30) 502:"Instructions

must be read as a whole,rather than individually, and as out of context, and they are to be given reasonable construction from the standpoint of their probable effect on the jury." (City of Oakland v. Partridge (1963) 29 Cal.Rptr.388,214 CA2d 196)

Trial by Jury # 607(a):(2) "Practice of instructing jury on isolated portions of evidence is not commended or encouraged." (Elkinton v Cal.St. Auto Ass'n Interstate Ins. Bureau(1959)343 P2d 396, 173 CA2d 338)

Weightman v Hadley (1956) 138, CA2d 831, 292 P2d 909:(2):(Height v Minor 113 Cal. 385, 391, 45 P 700)

Haas v. Central Union H.S.Dist. 27 Cal.App. 2d 319,322, 80 P2d 1044.

Re:Law of the Case "There is however, a settled limitation upon the doctrine which must be taken into account. This qualification is that when an adjudication is made upon certain state of facts there must be substantial identity of facts on a subsequent appeal in order that the doctrine shall be applicable." (Haas v Central Union H.S. Dist. 27 Cal.App.2d 319, 322, 80 P2d 1044)

Vagel v. Vagel 45 C2d 804; 291 P2d 25.; Eng. v. Hosp. of G. S. 14 Cal.2d 791,795, 97 P2d 813;Wicktor v. County of L.A. 177 CA2d 390; 2 Cal.Rptr.352)

Rivaid v Bd. of Pen, Coms.(1985) 164, Cal. App.3d 405,414, 210 Cal.Rptr. 509.

Richmond v Dart Ind.Inc.(1987) 196 Cal. App.3d 869,879, 242 Cal.Rptr. 184.

Raising of new theory on Appeal, contemplating factual situation consequences of which are open to controversy are impermissible unless facts are undisputed and party merely raising new question of law. (Jamison v. City of Oxnard (1982) 134 Cal. App.3d,856,858-859 Cal.Rptr.864)

CCP 909 #77:Issues not Pleaded; Appeal and Error 1122 (2)."Where no estoppel was pleaded and Trial Court made no findings thereon, Reviewing Court cannot make a Finding thereon." (Mc Auley v Broackway Tahoe Vista Corp. (1930) 293, P626, 110 CA 88)

"Doctrine of the Law of the Case does not extend to points of law that might have been but were not presented and determined on the first Appeal." (People v Shuey Sup. 120 Cal.Rptr. 85 (10); Criminal Law #1180)

People v Shuey, 120 Cal.Rptr. 90 ;"Accordingly, the latter issue is 'not before' the court on the first appeal, and the plaintiff was free to present it on the second appeal." (Di Genova 57 Cal.2d 179, 18 Cal.Rptr. 369; 367 P2d 865)

CCP 909 #83 Inferences:"Reviewing court may not substitute an inference different from that drawn by the Trial Court." (Epley v Hiller (1954) 274,P2d 696, 128 CA2d 100)

"An Appellate Court must disregard contrary evidence as well as contrary inferences and conclusions which were not but which might have been drawn by the trier of fact, " (Wolfson v Beatty (1953) 257,P2d 1017,118 CA2d 3920)

"Plaintiffs sueing to quiet title, has burden to show that he or his ancestor, predecessor or grantor was seized or possessed of the property within five years before commencement of action." (Stafford b Ballinger (1962) 18 Cal. Rptr.568, 199 Ca 2d 289; CCP318.

U.S. Supreme Court has jurisdiction because the holdings of the State Court of Civil Appeals, Fifth District conflicts with the rationale of the rules governing the creation of easements, i.e CCP 1104; CCP 806; CCP 1856(a); CCP 437(c) West's Ann. Civ. Code #19 and/or 1104; Kytasty v Godwin, 102 Cal.App.3d 762; Orr v. Kirk 100 CA2d 678, 224 P2ds 71; Fristoe v Drapeau 35. Cal. 2d 5,8, 215 P2d 729; Navarro v Pulley 66 CA2d 827, 153 P2d 397; Tarr v Witkins 4 Cal RPtr. 203; Kreiger v. Pacific Gas (1981) 119 Cal.App.3d 145, 755-756; Lord v Morris (1861) 16 Cal. 482, 491; Rosebrook v Utz 45 CA2d 729

(continued to next page)

(1941) Alameda County; Piazza v Schafer 255, CA2d 328, 63 Cal. Rptr. 246; George v Gosgarian 189 Cal.Rptr 95, (1983); Gagnon v Adamson 122 CA2d 678, 224 P2d 71; Lux v. Freed (1960) 53. Cal.2d 512; Mc Donald v Mc Elroy (1882) 4 Kent's Com. 473, p. 489; Lawrence v Montgomery 37 Cal. 183, 188; 3 Witkin Summary of Cal. Law (8th Ed. 1973) Real Property #355 P 2052; Powell on Real Property Abridged Ed. Powell Ruban 545. etc.etc.

The truth of the matter is, plaintiffs have not satisfied a single neccessary element but have prevailed based on self contradicted (perjurous) testimony and Fraud and by virtue of misconduct by Court and the officers of the Court.

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STATEMENT OF THE CASE:

On Oct.29, 1969 the Mc Carthys conveyed 440 acres in Section 11 to Robert C.Monroe (herein "Monroe") and his partner, A. Fletcher Harris, as undivided interest by Deed. Testimony varies as to roads existing in the SE ¼ of Section 11 (herein "SE¼"),at this time.

Phyllis Mc Carthy's declaration (entered into the record) states that two trails existed from the southern portion to the northern portion of her land which she and her husband used for horseback riding, hiking and ranching.

Bulldozer operator, Floyd Walls, testified that he widened and improved two trails, on the land which were 2 to 3 feet apart, in the winter of 1969.

Walls testified that the "brush was real high" and the trails were not visible in some spots. He testified,"there were areas that you couldn't walk",--"somtimes we

would walk and sometimes we would ride on the bulldozer." Walls did not know where the road was physically located. He knew that surveyor Alan Whitlock had prepared his May 1970 Work Map of Section 11, after Walls had completed the road.

Alan Whitlock's May 1970 Work Map "Showing Co. Rd. and Proposed Roads" depicts the "Piute Mt. (Co.Rd.)" as running from the southern portion to the northern portion of the land.

Whitlock also depicted a Proposed Road as a Bell-Shaped-Curve (herein "BSC") in the SE ¼.

May 25, 1970 Monroe conveyed the S½ of the SE¼ (herein "S80") to defendant, Patricia Rose Rabida.

Defendant intended to buy only 40 acres but decided to buy the S80 to insure her privacy.

Plaintiff,Stoye Milburn,(herein "Milburn") was acting as Robert C. Monroe's agent in

the selling of the property.

Milburn negotiated to acquire the N½ of the SE¼ (herein"N80") then he acted as Monroe's agent in selling the S80 to the defendant, telling her that teachers were negotiating to acquire the N80.

On May 25, 1970 defendant agreed to purchase the S½ of the SE¼. Milburn used the May 1970 Whitlock Map as defendant's deposite receipt.

According to Aerial Photographs (herein "AP") interpreted by two expert witnesses, a W-E road was constructed sometime after April 25, 1970 and before July 2, 1970, across defendant's west 40 acres.

July 13, 1970, Monroe conveyed the E½ of the N½ with "a road from the north" to a Jerry D. Smith who is not involved in this action.

On July 13, 1970 Monroe retained the N½ of the SE¼ bordered on the south by defendant and on the north by Smith.

The following month, surveyor Alan Whitlock prepared a "Survey Map of Access Roads in the south half of Section 11."
This Aug. 1970 Whitlock Map depicted one road in the SE¼ i.e.W-E road travelling from the Co. Rd.across defendant's west 40 acres. (Appendix T)
On Aug. 18, 1970, Monroe conveyed this Aug. 1970 Whitlock Map to the defendant. Monroe's transmittal letter stated, inter alia. "Enclosed is a map prepared by our surveyor showing roads as they are located on your property."
Sept. 18, 1970 Monroe conveyed his retained N80 to Milburn. The record is silent as to defendant's knowledge of Milburn's acquisition..

Jan. 1971 Guilliamo Moya acquired a 20 acre parcel in the N80. Moya sued Milburn and Joseph B. Van Orden (herein ""VOrd") for selling him land without an easement.

June 15, 1971, Milburn purportedly con-

veyed 40 acres to VOrd.

The June 15, 1971 deed from Milburn to VOrd presented to the court related to land in Section 15. No such deed relating to land in Section 11 was ever presented.

The record is confusing as to the conveyances purportedly made to the others, and no documentation thereof was presented.

Aug. 1977, six separate purported tenants of the N80 sued defendant for easement rights over her land. Guiliamo Moya was not named in the suit. (Appendix N)

Harry M Reynolds (herein "Reynolds") of "Manning, Reynolds, & Roberts", who was exchanging land with VOrd & family, authored the complaint. VOd verified it. Milburn, who was unrepresented, defaulted.

Said Complaint alleged that Monroe had created an easement over defendant's land by constructing a road which had been used by plaintiffs and plaintiffs' predecessor in interest until defendant, the then owner,

blocked it off. Complaint alleged that an easement. 10 feet in width existed appurtenant to each of the six separate tenements in the N80.

Complaint gave no description of the land burdened by the easement nor make any reference to a map whatsoever.

It made no allegation of grantor-grantee relationship between defendant and any one of the six plaintiffs, nor any separation of their titles from that of the defendant. Defendant cross-complained against Monroe, Milburn and Plaintiffs.

In answer Monroe alleged no interest in the defendant's land.

Defendant's own attorney secretly released Monroe"with prejudice".

Municipal Court Judge, John M. Stanton from Mojavi, presided over the trial. When asked if he were a Superior Court Judge, he answered in the affirmative. Reynolds' partner, Virgil Roberts, re-

sented plaintiffs at the trial.

VOrd was the only plaintiff to testify. Defendant's request that Monroe and/or Milburn testify was rejected. Plaintiffs attempted to introduce Monroe and Milburn depositions in lieu of court testimony. Plaintiffs declined defendant's request that the Mc Carthy deed be submitted.

PLAINTIFFS' TRIAL TESTIMONY

In their Opening Statement, Plaintiffs submitted a zerox copy of Whitlock's May 1970 Work Map which VOrd had prepared by drawing lines to "identify the properties"

Virgil Roberts stated: "When the land was sold to (defendant)--there had not been any roads placed on the land whatsoever --Milburn showed (defendant) the property---also--- a map indicating the proposed roads on that property."

VOrd testified: The May 1970 Whitlock Map was a Survey Map which "showed the property accurately," and he had

traveled over the BSC road on June 19, 1971. He first saw the May 1970 Whitlock Map in 1971 when he got a copy to assist him in deciding to buy 40 acres.

He had known Milburn before "from looking at other land" and had joined him as the investor in a Joint Venture in the N80.

VOrd "did not visit the property prior to (his) purchase, it was after Milburn purchased the---upper eighty from Monroe."

In 1973, VOrd realized there was a problem. He composed a letter for Monroe to mail back to him so as to help him get the right of way. Monroe conveyed this letter directly to VOrd in Dec. 1975, via U.S. Mail. VOrd gave it to his attorney. The letter claimed that Monroe had failed to reserve the easement through oversight.

Repeatedly, plaintiffs referred to **"the 160 acres in controversy"** In their findings, the **"the"** was dropped, saying Mc Carthy conveyed 160 acres to Monroe

which was then divided into two 80 acres. Milburn's deposition, read by plaintiffs into the record, disclosed that Monroe's attorney had discussed the May 1970 Work Map with Milburn "in the library" immediately preceeding his testimony, and had made markings on the map, claiming it to be his exhibit.

Milburn's deposition stated that defendant knew that first a W-E road would be constructed to give them access and later a N-S road would be constructed "spurring off" the W-E road, to provide access to the N80 and that there were many discussions as to the location of roads.

Milburn said:"--I did not know the length of the road---that it was going to follow this map exactly---We had a sectional map. ----a survey map which later--was created.

At end of plaintiffs' testimony, Judge Stanton stated:"--right now we haven't gotten very far on this-----right now

we are getting nowhere fast on either one of these elements." (use of road prior to separation of title and necessity)--if we could keep the evidence down to those matters---the rest of it is--- irrelevant,"

DEFENDANT'S TRIAL TESTIMONY:

Defendant moved for non-suit based on the statutes having run. Court tentatively granted, then denied it.

John Varin testified: Sept. or Oct. 1970, he constructed a N-S road spurring off defendant's W-E road. Defendant tried to stop him. He was hired by Milburn and acted under the assumption that he was on Milburn's land,

Defendant submitted, Whitlock's Aug. 1970 Map of "Access Roads in The Southern Portion of Section 11".

Judge Stanton, rejected it saying:

"But that isn't the map. as I gather from the evidence, counsel, that anybody bought the property from--there was a map when she

bought the property, there was a map showing a road when Mr.VOrd bought the property," Defendant presented her grantor's conveying letter to the Aug.1970 Whitlock Map on the issue of intent, which was also rejected, saying that he didn't care what it said "but what he may have said in the letter and what he did are two different things." Defendant presented 6 Aerial Photographs (herein "AP")to which expert witness, James Ricketts,testified as follows:

6-12-40 showed only Piute Mt. Rd..

7-23-62 showed only Piute Mt. Rd.

4-23-70-showed only Piute Mt. Rd.

4-25-70-showed only Piute Mt. Rd.

7-2-70- showed a very distinct road leaving the Piute Mt. Rd. and going generally easterly.

7-19-75-showed a road heading easterly off the Piute Mt. Rd. and also a road heading north off the W-E road.

DEEDS SUBMITTED AT TRIAL:

TEX.O:Monroe to Rose Deed on May 1970.

TEX.M:Monroe to Milburn Deed on Sept.1970.

TEX.N:Milburn to VOrd on July 1971 for land in Section 15, instead of Section 11.

Virgil Roberts avoided defendant's request for the Mc Carthy to Monroe deed.

Oct. 6, 1981 HEARING ON FINDINGS OF FACT: Defendant severely objected to each one of plaintiffs' findings. (Appendix V)

In answer to the objections, court repeatedly requested new Findings on the Second Cause of Action, on the Affirmative Defences and the Cross-Complaint.

March 24. 1983, Plaintiffs submitted 2nd Findings which stated inter alia:"Said easement shall be 20 feet wide and shall follow the center line of the access road as said road existed on May 25. 1970."

May,28, 1983, Plaintiffs submitted 3rd set of Findings, stating inter alia:"Said easement shall be 30 feet wide and shall follow the centerline----"(emphasis added)

At Oct. 6, 1981 hearing Judge Stanton said, he was now presiding in the Fifth District Appellate Court. In 1983,he was still there. Dec. 1983, Judgment was rendered in favor of plaintiffs. Again, no legal description of the land burdened by the easement. Defendant appealed to the Fifth District Appellate Court.

The 1985 Opinion affirmed the judgment as being for easement over a road entering the S80 from the west, running north in a BSC, then continuing back south into the S80; stating that the Access Road as it existed on May 25,1970 and road shown on "Whitlock Map" are one and the same."

The Opinion concluded:

"No witness spoke of the road's width, or the nature of traffic carried by the road after it was bulldozed. Under these circumstances, ---it is neccessary to remand the matter to the trial court on this issue for the taking of additional evidence regarding

the existing road,and the use it was put at time of implication. The judgement of the trial court as it found an easement by implication is affirmed. Judgement is reversed as to the finding that the implied easement was 30 feet in width, and remanded to trial court for further proceedings consistent with this Opinion."

REMAND HEARING, July 31, 1989: Plaintiffs requested a stay to have a road surveyed saying they had "improved the road". David Brown testified that he had surveyed the road on Aug.4, 1989 and prepared a "Platting",at which time this diagonal road was the only road existing on the land. The Platting was accompanied by a Legal Discription of an easement for ingress and egress and utility purposes. Defendant objected saying:"We're talking about a road that existed on May 25, 1970, This map and --survey was done last week" Court:" If in fact it is authenticated that

he surveyed the road, which according to VOrd is the only road on the property,that is what he surveyed and we're going to take it in, Okay."

VOrd also testified that this was the only road existing on the property, then he testified that other roads did also exist. VOrd testified that there were many maps showing the same road in different places. He testified that "if a boulder blocked off half of the road you couldn't get by"; that the road was not used by Mc Carthy from 1929, they just ran cattle;there was no easement at that time; there was no need for an easement before the S½ was devided 80 and 80; that no easement existed when he made his purchase,he knew of no other easements having been created. VOrd now said he bought --in 1971, and he may have gone up there in 1970, but he was not sure. He had no knowledge the use of the road in May 1970.

Over the years VOrd bought, parceled, and sold land in the vicinity, about 20 times. He also "took care of problems like this" for a living,"as a hobby".

VOrd also owned land in Section 29,

He said that it was not a Joint Venture, he was Milburn's friend so he was helping Milburn improve and sell the property.

He testified: "I own the two 20 acre parcel""--I purchased 40 of the 80.--subsequently transferred some of that property to others---someone else purchased the other 40 acres in the upper 80. People in Bakersfield bought two 10 acre pieces. Charles Mc Gowan bought a 10 acre piece, and Knapp bought a 10 acre piece, Kent Wardell also bought a 10 acre piece---."

84 pages later VOrd testified: "Yes I sold to Charles Mc Gowan and Wardell and---."

VOrd testified that he "bought and sold other parcels in the general area but not in this particular area."

On Cross-Examination defendant read from VOrd's deposition as follows:

"Mr VOrd, 'Do you presently own any land----in the N½ of the SE¼ of Section 11--.'

Answer,'No'.

'Did you own property in that Section ?'

Answer. 'Yes'."

VOrd testified that Monroe and Milburn" had no knowledge of the width of the easement."

Witnesses from Planning and Fire Department testified that a 1984 Ordinance requires an off-site easement to be 30 feet,when constructing buildings.

EXPERT WITNESS DON WARD'S TESTIMONY:

Expert, Donald E.Ward (herein "Ward") with 20 years experience as an owner and manager of Western Photo Air, in the Photographic Business, specifically interpretation of photographs, examined the various maps and compared them directly to the APs.

Rabida charged that the record had been altered regarding the testimony given

here and elsewhere. In her "Correction of The Record" she charged that she was very aware of the need to give the month as well as the year when referring to the Whitlock Maps,which she did do, but the record was altered. Ward testified at the hearing for Correcting the Record but the Court still refused to make the record conform to the testimony. The Transcript of the hearing was entered with Court of Appeal. Ward compared Plaintiffs' EX. 2 (Brown's Diagonal Road) to the July 1975 AP stating; "The access road as shown on the exhibit--does not fit any of the roads that are shown on the AP as of 1975."

Rabida:" I wish to show you another map--This has to do with the road existing on May 25, 1970"

Reynolds:"Your honor this is the same map she has already tried to introduce through VOrd. It has nothing to do with this case. This is irrelevant. This is a sketch, it

is not a survey road, a sketch." [1]

Ward:"--the road shown here does not exist, so it doesn't have a width---" [2]

Court: "I can tell you, the appellate court says it does."

Rabida showed Ward a third Map,saying that it had been prepared by Alan Whitlock.

Ward:"--There is a configuration on the photograph that fits generally the configuration that this shows, This is not a precise survey. The AP is."

Reynolds:"Could we save time by asking this witness if he is familiar with the width of the road and the prior use ?"

Ward: "Yes, with respect to what you see there, I certainly can tell you as to the use, but not the width."

Court: "How can you tell the use ?"

---

1. Rabida had tried to get the May 1970 Whitlock Map before this court.
2. At this point, Reynolds jumped up yelling "He's lying."
3. Only the May 1970 Whitlock Work Map had been put before the Appeals Court.

Ward:" Because it's graded and evident."

Q."That means that somebody used it ?"

Ward: "Yes."

On Voir Dir, Ward testified that he could "discern a road through the brush unless there was total brush--which rarely happens. That is not the case here."

Rabida then presented AP 7-2-70,

Ward:"This is an AP, very much to the same scale as the one that our company did in 1975.---It has a date at the upper left hand corner. It also has an identification number on it---it was flown for photogrammetry, which they can survey, use the photographs to survey the land---"

Rabida presented a tracing that she made of 1975 AP.labeled A to B.asking:

"Does this configuration from A to B ---- depict what existed in 1975 as far as a road goes, that is a graded existing road?"

Ward:"The general alignment does show on the photograph, yes." (Appendix S)

Rabida:"In your opinion, was this road constructed after the AP July 2,1970 ?"

Ward:"If---your question to me was--- was this road constructed the period of time when this Photograph was taken and when this Photograph was taken, My answer was yes."

Rabida:"--So between 1970 and 1975 ? Okay. Was this road constructed after Aug. 1970, according to this Map compared to the AP ?"

Ward:"Yes."

Rabida:" Mr. Ward-----have you made any examinations of this exhibit ?"

Ward:"Yes, I have.---I've plotted the description as it is written here, and I have a map ---that was drawn showing the easement itself." (Appendix Q)

Rabida:"Now, can you tell me what you found about the existing road compared to this description of the easement ?"

Ward: "With respect to the 1975 Photograph --It indicates there is a portion that does

not exist physically ------.This is the beginning of this road, and these little configurations in here are the road coming down in this direction, This portion of the road over here is this portion over here. As you can see, there is a hiatus someplace in here, between one of these curves and this road over here, is the way it is drawn. ----The easement shows that there is a road across an area that the photograph does not show. The existing road on the Photograph is not the same as the easement."

Court:" It describes the existing road as it exists now."

Rabida:"But a portion of it does not exist."

Court:"It exists now. It may not have existed to be photographed in 1975."

Reynolds:"It may have existed and not seen in the photograph."

Court:"That's correct. It may not have been photographed."

Correction of the Record Testimony;

Ward ; "That would have been the one later on,that showed existing road. The first one didn't show existing road.-- The map she is referring to here was a presentation by Whitlock--of existing roads as of --Aug. 1970."

Court: (to clerk): "Do you have 2A there ? Let me see it."

Court:"Does this look familiar to you ?"

Ward:"That was not the map, but that is familiar to me, Yes."

Court:"I know it's not the map, but this is Brown's survey-- of the road---Is that somewhat like they appeared on the map ?"

Ward:"Not on this map , no."

Court:"What map does this appear on ?"

Ward:"The map that she is referring to. here was a presentation by surveyor -- Whitlock--of existing roads as of the date of the map, which is Aug. 1970. That survey and that road came much later."

Court:"Okay. But you recognize this road ?"
Ward:" I recognize that road, yes, because I've been there and I've seen it."
Court:"Referring to 2A, the exhibit which is attached to 2A entitled Access Roads."
Ward:"Your Honor, that road did not exist as of August 1970"
Rabida:"The Brown Road didn't exist in Aug. 1970, but the Whitlock Map (road) did exist in Aug. 1970---"
Ward:"Those Photographs bore that out.---"
DEFENDANT'S REMAND TESTIMONY:
She first presented the Mc Carthy-Monroe deed saying the land depicted on the May 1970 Map was conveyed to Monroe.
She presented the original May 1970 Whitlock Work Map shown to her when she purchased the S80, saying: "The map speaks for itself,it says proposed roads,so that is evidence that no road existed on the property at that time. I says 'County Roads and Proposed Roads'. Very specific."

"But no road existed, and no one was using the road. Monroe was selling off this property. He was using a road from the north." Monroe sent her "a letter and map on Aug.18, 1970---the Aug, 1970 Map--and that road was actually constructed. But as you can see , it only entered my land and did not go to the land above me."

"Now the conveying letter with this map says: 'Enclosed is a map prepared by our surveyor showing roads as they are located on your property.'"

Defendant presented a certified deed from Monroe conveying the E½ of the NE¼ to Jerry D.Smith, on July 13, 1970.

The deed was slipped back in with her papers and her testimony was deleated however she referred to it in her closing argument, saying:

"From (Monroe's) grant deed that I presented,I have shown that Monroe owned 440 acres ---shortly after my conveyance Monroe deed-

ed a (80)acre parcel to Jerry D Smith----
with a road ---from north,in (July) 1970."
Reynolds:"I would ask the court to, in mak-
ing up it's mind, to consider the directiom
we are going, because I think we're just
opening Pandora's Box and we will be back
in the Fifth again----I'm trying to limit
what she can do once she gets there. I
think we are entitled to restrict her to
what the Appellate Court said this trial
was to be about, When we start talking
about Whitlock Maps and BSC, we can't de-
termine anything from the photographs---"
Court:"We will give it a go."
JURY INSTUCTIONS: After the instructions
were reviewed, Reynolds submitted a Special
Verdict without defendant's knowledge.
No objection was made to defendant's in-
structions. The record showed, Court re-
jected all of them.
Only Reynolds' Special Verdict was given
to the jurors.

Court instructed:"You are also to give consideration to what the County of Kern requires as a minimum width for a road easement as granted in this case."

Bailiff presided over the deliberations.

Judgment consisted of "30" & "yes" inserted on the Special Verdict.

Two of the jurors ran up to defendant in the hallway, saying:

"We're so sorry. We wanted to determine if the road existed or not but they said we couldn't. We had to decide on the two questions (Special Verdict) only."

DEFENDANT's APPEAL held; Plaintiffs' testimony void -did not follow Reviewing Court instructions; Plaintiffs falsified their evidence by constructing a new and different road by trespass; Judgment must be reversed since neither road testified to by Plaintiffs, existed at implication.etc.etc.

1991 OPINION held

Plaintiff/Respondents are Joint venturers.

Ward "testified-- access road as shown on map----Whitlock in May 1970---fit the general configuration of a road on the 1975 AP taken by him as part of a survey in 1975. (EX.E) Ward could tell--- that the road was graded and therefore used but he could not tell its width. Ward compared his 1975 Photograph (EX E.) with a July 2, 1970---- and found the Photos were 'very similar'.

"Ward's examination of the Photos disclosed only one road (the road depicted on EX. 2A) from the lower to the upper 80 acres, He testified the road in the 1975 AP did not appear as a continuous road."

Access Road as depicted on Ex. 2A is "consistent with the ascending line of BSC and with the applicable portion of the Access Road that appears on defendant's Ex. F."

"Court did not err in receiving testimony as to the width of the access road as it presently existed (1989), or testimony as to pertinent Ordinances,-- in refusing to

confine the testimony--to the condition of road as it existed in 1970, i.e. the time -----implication arose."

"the present uses, intervening uses and reasonably to be expected uses as of 1970, are relevant to the width of the implied easement at time--acquired.-- Kytasty v Godwin."

"---the testimony of a senior planner --- applicable section of the Kern County Parcel Map Ordinance established the off-site access road here required a minimum 30 foot easement. This was what was reasonably required as of 1970,for the 'future use of the dominant tenement....'" (See Appendix A;67,2-3; 73,19-75,2; 86,9-87,2; 90,10-14; 105,11-14 & 16-19; 105,20-106,2)

MISSING EXHIBITS:

Twentyone (21) of the twentyfive (25) exhibits submitted by defendant were not noted in the Reporter's Transcript.

In answer to her request for Correction of the Record, the Appellate court deemed

eleven (11) to twentyone (21) augumented into the record. Upon requesting verified copies of these eleven exhibits for incorporation into this Writ, defendant was informed that they could not be located. On Dec. 23, 1991, clerk noted that Exhibits one and 2-A had been removed from the record at the Appeallate court.

The 1991 Opinion holds that the road depicted on Ex. One and the road depicted on Ex. 2A are in fact one and the same. (See lines 11-12 at page 88 herein)

Defendant's own copy of Exhibit 2A was also missing from her home so she obtained a certified copy from the Hall of Records on Feb. 5, 1992.

Remand Testimony Relating to BSC Road and-or May 1970 Whitlock Map.

Plaintiffs did not mention the BSC road nor the May 1970 Whitlock Map.

Plaintiffs confined their testimony to the Brown Diagonal Road and the Aug. 4, 1989

Brown "Platting".

Plaintiffs refused to answer any and all cross-examination which referred to the BSC road and/or the May 1970 Whitlock Map, saying Whitlock was dead and the May 1970 Map was "not a survey" but "just a sketch".

Plaintiffs insisted that the 1985 Opinion requested testimony as to the width of the Aug. 4, 1989 Brown Diagonal Road and that any testimony relating to the BSC road or the May 1970 Whitlock Map was irrelevant. Judge Nairn agreed with the Plaintiffs.

Defendant presented the original May 1970 Whitlock Map saying it was "the exact map" shown to her. She submitted a certified true Colored Photograph and a true Zerox copy of it to the Court as her Exhibit F. On the face of this photograph, it shows notations of "S" and "sold" as well as Milburn's notations and encircling of the 580 with an arrow pointing from the nota-

tions to the S80 to have been written in red directly on the original map.

At the 1980-1981 trial VOrd testified that the May 1970 Whitlock Map which was given to him did not have any notations on the bottom.

The 1991 Opinion held that the 1985 Opinion asked for evidence regarding the existing road, that Brown determined the width of "the existing 20-foot dirt road" and that the jury relied on this evidence in "determining the proper and neccessary width -- as of 1970" (See lines 5-20, page 91, Appendix A herein)

The Jury's verdict did not mention any date, It said: "The easement shall be---" (See footnote at page 100 Appendix A)

The jury was not given any of the exhibits to review during their deliberations. They were only given the Special Verdict.

Ten days later, Judge John M. Nairn filed a "judgment on the Special Verdict" con-

sisting of Brown's "plat map included in Exhibit 2-A, and the three page description incorporated therein" with the Jurys' Verdict. Thus the verdict was made applicable to the Brown Diagonal road and extended to include an easement for utilities.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the Judgment and Opinion of the Court of Appeal in this matter.

Where the prevailing party himself ,at Remand Hearing, contradicts the entire tesmony on which judgment relied, basic decency calls for such a review.

Private Property Rights are jeolously guarded by the sane societies of the world. A country that condones the taking of property by fraud and without Due Process is, in fact, an oppressive third world country.

Date: May 12, 1992

Respectfully submitted: Patricia Rose Rabida

Patricia Rose Rabida

Pro Per

Patricia Rose Rabida

Court of Appeal Fifth Appellate District

Filed November 5, 1991.

by Kevin A Swanson-Clerk, Deputy

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIFTH APPELLATE DISTRICT

JOSEPH B VAN ORDEN,et al.,	)	F012692
	)	
Plaintiffs and Respondents,	)	(Super.Ct.
	)	No.148546)
v	)	
	)	
PATRICIA ROSE RABIDA,	)	OPINION
	)	
Defendant and Appellant	)	

APPEAL from judgment of the Superior Court of Kern County, John M. Nairn,Judge.

Patricia Rose Rabida, in pro. per.,for Defendant and Appellant.

Henry M. Reynolds, attorney for Plaintiffs and Respondents.

-ooOoc-

Defendant and appellant Patricia Rose Rabida appeals from a judgment establishing the width of an implied easement across her property. We will affirm.

BACKGROUND

Plaintiffs/Respondents are joint venturers and the owners of six seperate parcels totalling the 80 acres that comprise the northern half of the southeast quarter of section 11.Township 29 South,Range 33 East, Mount Diablo Meridian, in Kern County.[1] Defendant/Appellant Patricia Rose Rabida is the owner of the 80 acres comprising the southern half of the southeast quarter of Section 11. A few months prior to the purchase of the northern 80 acres by Respondents' Predecessor in Interest in 1970, appellant purchased her southern 80 acres from the same grantor, in May 1970. The remote property is located in rugged, high country north of Tehachapi and south of Lake Isabella. The eastern

1/ References hereafter to "Section 11" are to the southeast quarter of Section 11, Township 29 southm range 33 East, Mount Diablo Meridian, in Kern County

boundary of Section 11 borders the Sequoia National Forrest; on the west, Section 11 is bordered by land controlled by the Bureau of Land Management.

Respondents filed an action against Appellant in 1977 to establish their right to an easement appurtenant over Appellant's lower 80 acres for ingress and egress to their parcels in the upper 80 acres. Judgment following a court trial in 1981 was rendered in Respondents' favor. Findings of Fact and Conclusions of Law were filed in 1983 and Judgment entered on June 1, 1983. On March 25, 1985,this court filed an Opinion affirming lower court's finding that Respondents held an implied easement over Appellant's property.(Van Orden v Rose(March 29, 1985) F002875 (non-pub. opn.), typed opn. pp, 13-15. (Hereafter Van Orden I) However, the judgment with respect to the trial court's finding that the implied easement was 30 feet in

width was reversed and remanded to the trial court for further proceedings after this Court found the Lower Court's selection of a 30-foot width was not supported by substantial evidence.(Van Orden ,supra, typed opn. pp17-19)

PROCEEDINGS ON REMAND

In a two-day retrial before a jury (August 7-8, 1989) Appellant appeared in proper persona. After less than an hour of deliberations the jury found, by Special Verdict, that the easement across Appellant's property "shall be 30 feet in width" and that such width was "reasonably required considering all the uses for which the property is adapted and available and consistent with its prior use." Judgment entered and a timely Notice of Appeal followed.

EVIDENCE ON REMAND

Respondent Joseph Van Orden recalled first traveiling the sole road leading

from the lower 80 acres into what would become his upper 40 acres along the lower slope of Piute Mountain in early (May) 1971. It was possible that he first travelled onto the property in summer of 1970 when he was contemplating the purchase. Whether the first time was in 1970 or 1971, the road appeared to have been there for some period, was not overgrown with brush (an indication of heavy use) and had "definitely " been traversed by cars in the past, as the soil was compacted. Some ruts and automobile tire marks were visible. The road looked like it had been "cleaned up" with a bulldozer, but not freshly made.

Over the years he traveled the road nearly 20 times. Initially he traversed the road in a Mustang; he saw people use Pickups, Vans and Four-Wheel-Drive. The road he first traveled in 1970 or 1971 was the "Main" Road Appellant later padlocked. Van Orden testified the Northern 80 Acres

was approximately one mile from Piute Mountain Road; it was located in very rough terrain, riddled with boulders and ravines. The property was only suitable to personal, recreational use. Van Orden hoped to build a mountain retreat for his family.

Shortly before the instant trial, Van Orden had the "Main" Road (the same road he had travelled on since 1970 or 1971) surveyed by a licensed land surveyor, David Brown. Brown had worked as a surveyor for approximately 30 years; for the 16 years prior to trial he had been licensed and owned his own surveying business, Brown saw and surveyed only one road running from the lower to the upper 80 acres, The existing dirt road bed averaged 20 feet in width. Brown explained that in order to have a road serving more than one parcel that would satisfy Kern County Fire Department Regulations,, the road would have to be a minimum width of 20 feet, as well as

allow sufficient additional footage for cuts and fills.[2]

The applicable Kern County Parcel Map Ordinance required a minimum 30 feet of width for off-site Access roads. Brown testified: "(T)o meet the Parcel Map Ordinance you need a minimum of 30 feet of easement, which would also include the cuts and fills." As it presently existed, the Access Road satisfied County requirements.

Ross Elliot, a senior Planner in charge of the Land Division Section of Kern County

2/ Philip Neufield, employed by the Kern County Fire Department as a fire prevention specialist, testified a minimum 20 foot roadbed was required in order to obtain building approval so as to allow two way traffic and emergency vehicle access, The minimum twenty feet of flat roadbed was defined as "where you can put a tire on it," not including any soft shoulder.

Planning and Development Services, affirmed the Kern County Parcel Map Ordinance (# 18.80.030(B)) required off-site Access Roads (including attendent cuts and fills) to have a minimum easement width of 30 feet.[3]

The map of the Access Road drawn by Brown on August 4, 1989, and attached to the survey he prepared was a general pictorial view of the road (a general plat) to go with the accompanying legal description. Due to the number of small, winding curves on the Access Road the Map was only

3/ The Kern County Parcel Map Ordinance defines as "off site Access Road" as "an easement for vehicular access located on land not owned by the applicant," (Exs. 4 & 4-A; # 18,80,010 (D).)
To respondents, owners of the upper 80 acres, the road leading into their property over Appellant's lower 80 acres was an Off-Site Access Road.

approximate. However the legal description included within his Survey was exact. Brown described a 30-foot easement for ingress and egress on his survey because "the Kern County Parcel Map Ordinance requires a minimum of 30 foot road easement.

Appellant called Donald Ward, a licensed Land Surveyor, as a witness. He testified that the Access Road shown on a Map prepared by Alan Whitlock in May 1970 ("Plaintiff's Exhibit 1 (1980)" and "Defendant's Exhibit A (1980)")[4] fit the general configuration of a road on a 1975 Aerial

4/ "Plaintiff's Exhibit 1" and "Defendant's Exhibit A" bear an official Kern County Exhibit Sticker from the first Trial dated September 3, 1980. They were not entered as exhibits in the instant Trial (1989) although the Whitlock Map in some form was referenced by Appellant and shown to witnesses.

Photograph taken by him as part of a Survey in 1975. (Exhibit E) Ward could tell on the 1975 Photograph that the road had been graded and therefore used, but he could not tell it's width. Ward compared his 1975 Photograph (Exhibit E) with a July 2, 1970 Photograph entered as an exhibit in the first trial (but not the instant trial- "Defendant's Exhibit J (1981)" and found the Photos were "very similar". Ward's examination of the Photos disclosed only one road (the road depicted on Ex. 2-A) from the lower 80 acres to the upper 80 acres. He testified the road on the 1975 Aerial Photograph did not appear on the 1975 Aeri.l Photograph as a continuous road.

POST TRIAL PROCEEDINGS

On October 18, 1989, Appellant filed in the Superior Court a notice of intention to proceed by settled statement and a notice of designation of the record. The re-

cord designation included the transcript of the 1980-1981 trial, numerous "exhibits", some of which were marked and entered at the instant trial, some of which were referenced at trial and marked, or referenced at trial and not marked, or referenced, marked but denied admission as evidence. As is obvious from the factual statement supra, many of the exhibits were exhibits entered at the prior, but not the instant trial.

The Kern County clerk issued a rule 10(c) default notice (failure to post fee for preperation of reporter's transcript); relief was granted by this court on January 31, 1990. A single Clerk's Transcript and Reporter's Transcript of the proceedings on August 7 and 8, 1989m (instant trial) were filed on March 30, 19909. Appellant's April 9, 1990, Motion to Correct the Record by the addition of certain exhibits entered only at the prior

trial, as well as an exhibit from the instant trial, and to correct certain statements in the reporter's transcript was deemed to be a request to file a belated motion to prepare a settled statement and/or to correct the record.(People v. Gzikowski (1982) 32 Cal.3d 580, 584-585, fn. 2). The hearing on the belated motion was held in the trial court on July 19, 1990.

At the hearing, a superior court clerk testified as to the proper time and procedure for transmission of exhibits entered into evidence at the instant trial. as to several documents Appellant wished to have transmitted as part of the instant record, the Court advised Appellant to file a Motion to Augment in the Appellate Court, insofar as said documents were "received" in the instant trial.

The Lower Court's Settled Statement was filed on August 7, 1990. The court noted

the Trial Transcript was correct and needed no alterations or additions; the Lower Court suggested Appellant pursue Augmentation of the Record where appropriate. Apparently following the Lower court's suggestion at the July 19, 1990 hearing, Appellant had already filed in this court an Application to Augment the Record with numerous items allegedly produced or referenced during the course of the instant trial, but not admitted into evidence, as well as certain documents in the Superior Court file pertaining to the first trial.

On August 17, 1990, this court entered an Order (1) determining the record of August 7 and 8, 1989 trial to be correct (2) denying the request as to items 12 to 21 for a variety of reasons, (3) directing Appellant to have a Supplemental Reporter's Transcript prepared containing her Proposed Jury Instructions dated July 31, 1989 (item 22) and (4) deeming the Record

augmented to include items 1 through 11 (Photographs, Maps, and Documents not admitted but referenced, in part, at the instant trial). As to items 1 through 11, this court noted "(n)othing in this Order, however, constitutes a determination of the relevancy of this material or the propriety of considering the material in connection with this Appeal." A Kern County Deputy Clerk filed an affidavit on October 11, 1990, stating she was unable to locate any Proposed Jury Instructions by Appellant dated July 31, 1989, despite the copy provided by Appellant.

Respondents reviewed Appellant's Opening Brief filed August 29, 1990, and, after 13 years of this litigation, decided to stand on the record and filed no Respondents' Brief. Finnally,Appellant's applications in this Court for "Findings of Fact and Conclusions of Law" on November 14, 1990, and to " Produce further Evi-

dence" were denied on January 17, 1991.

DISCUSSION

It appears that the majority of Appellant's transcript references (i.e. "TCT" (Trial Clerk's Transcript) must be to the record in Van Orden I because the record citations do not pertain to or support what they reference in the 1989 trial record. The record from Van Orden I was not incorporated as part of the instant record (although appellant asked for it and references it in her Brief). Appellant has not requested that this court notice judicially the record in Van Orden I, nor does it appear that would be necessary since the instant issue deals only with establishing the width of the easement. all relevant evidence pertaining to that issue is contained in the 1989 transcript.

It should be noted Appellant had difficulty throughout the 1989 Trial accepting the fact that the Lower Court's Finding

in 1983 that an easement by implication existed had been confirmed by this court in 1985 and that determination was now final. not subject to relitigation or impeachment with further evidence.Appellant insisted there was no road to the upper 80 acres through her property at the time she acquired her interest in May 1970 so there could be no easement. The Lower Court repeatedly advised her the Appellate Court had determined in 1985 that the road and easement did exist at the time she acquired her interest, and suggested she move on, but to little avail. (E.g., Appellant:"The Appellate Court says there is (a road) now, but I'm giving my side of this.") [5] Appellant continues

5/ ...to which Judge Nairn responded: "Your side doesn't matter. They said there is an easement there, there is a road there, When they tell us to do some-

(Fn. continued)

to attempt to relitigate the finding of an easement again in this Appeal.

The 1983 Judgment affirmed by this Court in 1985 was rendered on the merits and is final. "(A) matter adjudicated on a prior Appeal normally will not be relitigated on a subsequent Appeal in the same case." (Davies v Krasner (1975) 14 Cal.3d 502, 507, fn,omitted.) As to those issues that were raised, expressly or impliedly, and resolved against Appellant, she is precluded from raising them here by the Doctrine of Law of the Case. (Hanry v Lund (1963) 218 Cal. App. 2d 633, 638-639) "Hence after entry of judgment in conformity with the directions, the Respondent cannot...on Appeal, relitigate the same issues. (Citations.)" (9 Witkin, Cal.Procedure (3d ed. 1985) Appeal, # 636, p.617.)

As to the "Points" that could have been

thing, we do it. When they say jump, we say how high, that's it.

raised in the appeal in Van Orden I, those issues are outside the scope (and jurisdiction) of the Trial Court on Remand. They are not cognizable on this Appeal. "(An) Appellate Court may adopt a written Opinion determining the issues on Appeal and modify or reverse the judgment, specifically directing the Lower Court with respect to particular issues. In (those) cases the Trial Court has no discretion to interpret the Opinion of the Appellate Court, but, on the contrary, it is bound to specifically carry out the instructions of the Reviewing Court....." (Kenney v. Kenney (1954) 128 Cal.App.2d 128, 133-134, disapproved on another point in See v See (1966) 64 Cal.2d 778, 785) "The trial judge must follow the directions of the Appellate Court and enter the judgment accordingly. He cannot...retry the case; ..." (9 Witkin, Cal. Procedure, op.cit. supra, Appeal, # 633,p.613.) Where a

Reviewing Court is bound by the directions given and has no authority to retry any other issue or to make any other Findings. It's authority is limited wholly and solely to following the directions of the Reviewing Court..." (Rice v Schmid) (1944) 25 Cal.2d 259, 263.)

In Van Orden I, this Court specifically affirmed the judgment "insofar as it found an easement by implication"" but remanded for further proceedings "as to the finding that the implied easement was 30 feet in width,...consistent with (the) Opinion." (Van Orden I supra, typed Opn. p. 19.) That is the only issue the Trial Court had jurisdiction to retry; that is the only issue within the scope of this Court's review in the instant Appeal.

POINT I

Appellant argues Respondents' testimony pertaining to the 1989 Plat Map of the Access Road prepared by Brown shortly

before Trial (Ex.2-A,p.4) was outside the scope of this Court's directions on Remand. As specified in Van Orden I, the Remand was limited to the issue of the "road's width,...the nature of the traffic carried by the road after it was bulldozed (in early 1970)..."(Van Orden I, supra, typed Opn. p. 18.) To this end the Trial Court was directed to "(take) additional evidence regarding the existing road, and the nature of the use to which it was put at the time the easement by Implication arose."(Id.,typed Opn. pp. 18-19)

This appears to be appellant's argument: since the 1989 Map (Ex. 2A.p.4) was not in existence when Appellant acquired her property or at the time of the Trial in Van Orden I (1980-1981), it could not properly be considered in determining the road's width nor the nature of fits use in May 1970, when Appellate acquired the southern 80 acres. Appellate seems to infer the

"Bell-Shaped-Curve" Road, referenced in Van Orden I as the Access Road here in question (Van Orden I supra, typed Opn. p. 3), and the Abbriviated Access Road sketched by Brown at page 4 of Exhibit 2-A, are not the same road. The evidence supports the conclusion that they are the same road and Exhibit 2-A was properly entered in evidence and considered.

Although the survey Map prepared in "May 1970" by a surveyor named Whitlock was not properly tendered as an exhibit by Appellant or entered into evidence in the 1989 Trial, it is referenced in Van Orden I, was shown to witnesses during the 1989 proceedings and was the subject of considerable testimony. An enlarged Copy of the Whitlock Map also appears to be one of the 11 items deemed augmented by this Court on August 17, 1990 (Item 1).[6] When considered in the context of pertinent testimony, it is apparent the Access

Road depicted on Exhibit 2-A and the roughly sketched Road in the form of a Bell-Shaped-Curve on the Whitlock Map are the same Road.

The Access Road depicted on Exhibit 2-A does not depict a complete Bell-Shaped-Curve. This is because it only shows that portion of the Access Road as it appears on the western half of Appellant's Southern 80 acres. It does not extend into the Northern 80 acres, while the Road depicted on the Whitlock Map does extend into the Northern Half of the Quarter Section. It is consistent with the Ascending Line of a Bell-Shaped-Curve and with the applicable portion of the Access Road that appears on "Defendant's Exhibit F". The Access

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6/. See two identicle 11 by 13 inch Photographic Maps denominated "Defendant F" and "Defendant Exhibit F" by appellant. They are included in the Record but were never officiallly marked as Exhibits.

Road sketched on "Plaintiff's 1 (1980)" is obvously roughly drawn and not to scale. Brown testified the portion of the Access Road sketched by him on Exhibit 2-A was "a general pictorial view" of the road; it was only approximate due to the number of small winding curves. Van Orden , Brown and Appellant's Surveyor Ward all testified there was only one road from the Southern 80 entering the Northern 80 acres. That is the Access Road depicted on "Plaintiff's Exhibit 1 (1980)" and Exhibit 2-A.

The judgment in Van Orden I describes the easement as following"'...the center line of the Access Road as said road existed on May 25, 1970.'..." (Van Orden I, supra, typed Opn.p.15) there was no Surveyor's Description. In Van Orden II, Mr Van Orden testified that he hired Brown, a licensed surveyor, to make a survey of the road. About a week before the Second Trial he took Brown to the premises, point-

ed out and walked the road that existed in May 1970. He testified it was the only road that extended all the way from the western line of the Southwest Quarter of the Southeast Quarter of Section 11 into the Northern Half of the Southeast Quarter of Section 11. When questioned, Van Orden noted:

"Q. Whenever you went there the very first time. what did you see with respect to a road ?

A. The road was there, and the same Road that David Brown surveyed, the road that David Brown surveyed, the same road that was there at that time. There are other roads, but the Main Road going into the property, into my property that I had to go across was there the first time I went up to see the property.

.....

Q.Mr van Orden, you indicated last week

you went up to the property when it was being surveyed by Mr. Brown.

A. Yes.

Q. And is that the same road that you saw when you went to the property the first time in 1970 or 1971 ?

A. the same Main Road entering Pat Rose's property and entering mine, was the same last week as it was in 1970."

7

It was therefore appropriate, and within the scope of this Court's 1985 limited Remand in Van Orden I, for the Lower Court to receive and consider Exhibit 2-A, 7/ Strangely, during trial, Appellate Rabida herself noted: "they say the Floyd Walls road, That is the same road that this gentleman testified that Mc Carthy used when they owned the land. And so that's the same Road that the Appellate Court is saying now there is an easement on my land, that's the same Road.

(Hampton v. Superior Court (1952)38 Cal. 2d 652, 655; Hanna v. City of Los Angeles (1989) 212 Cal.app.3d 363, 376.) It is apparent that when Van Orden I is read in context, the Lower Court was directed to take additional evidence "regarding (the width of) the existing Road" as a step in determining the proper extent of Respondents' easement. (Van Orden I, supra typed Opn.p.18.) In preparing the Plat Map included in Exhibit 2-A, and the three page Legal Description incorporated therein, Brown determined that the Existing 20-foot Dirt Road Bed "averaged 20 feet in width," before allowing for necessary cuts and fills in the road. This was pertinent, and a portion of the relevant evidence the Jury used in determining the proper and necessary width of the easement as of 1970. The present uses, intervening uses, and reasonably to be expected uses as of 1970 are relevant to

the width of the implied assessment in 1970. (Kytasty v. Godwin (1980) 102 Cal. App.3d 762, 771-772)

POINT II

Incorporating her argument under "Point I", Appellate maintains she was surprised when Respondents "change(d) their testimony regarding the Road in issue." It is alleged the "surprise" prejudiced her in that it lessened her ability to respond to the evidence produced on behalf of Respondents.

As noted supra, the portion of the Access Road depicted on Exhibit 2-A is a portion of the same Access Road described in Van Orden I as the Road with the Bell-Shaped-Curve on the 1970 Whitlock Survey Map ("Plaintiff's Exhibit 1 (1980)"). Furthermore, Appellant acknowledges she was aware Respondents were having a Survey prepared of the road as trial was briefly delayed while the Survey was completed.

While Van Orden mentioned he last improved the Access Road six months prior to the 1989 trial. The improvements consisted of clearing regrown brush and filling in gullies. There is no evidence to support Appellant's inference Van Orden changed the direction,location and/or shape of the Road.

Appellate now complains the Trial Court "refused to allow (her) to testify to her theory of the case, which she had adhered to since the onset of the litigation i.e. no Road at all existed as of May 25, 1970 ..." In Van Orden I this Court acknowledged the evidence supported the following facts: a rough form of the Access Road had been in existence dating back to 1929; the modification/improvement of the Access Road in question had been completed by February or March of 1970 and when Appellant purchased her property in May 1970, she took with Oral and Written Notice of the

"road as indicated" on the Whitlock Survey Map. (Van Orden I, supra, typed Opn. pp. 2-3, 12-14.)

Appellant's challenge to the Lower court's Finding of an Implied Easement on the ground of insubstantial evidence failed in Van Orden I. (Id. typed Op. pp 6-15.)

As we have stated, that 1985 Opinion , rendered contrary to Appellant's "theory of the case," is now final and constitutes Law of the Case.

"POINT III"

Pressing forward with her idea that Van Orden altered the shape of the road just prior to Trial, Appellate argues that the testimony of her surveyor ,Ward established the Access Road on Exhibit 2-A was not in existence as late as 1975 when he conducted an Aerial Survey. (Exhibit E.)

In support of this argument, Appellate first submits "quotations" from colloquies she submitted as part of an apparent appli-

cation to proceed in part by way of Settled Statement. The application was marked "received" by the Trial Court on September 22, 1989. The September 22, 1989, Document purports to set forth by quotation lengthy "in chambers" exchanges outside the presence of a Court Reporter shortly before and during Trial. In these exchanges, Appellant is portrayed as repeatedly maintaining the Access Road later depicted in Exhibit 2-A did not exist in 1970. In part of the "testimony", Ward states that on certain (unspecified) Photographs shown to him, he can see a beginning and end to the Access Road but not the middle.

Insofar as the September 22, 1989, Document purported to be an Application for a Settled Statement pursuant to Rule 7 of the California Rules of Court, it was untimely and did not conform to the cited Rule. Furthermore, the Record contains nothing to demonstrate the Trial Court ever set-

tled the Statement and/or Appellate ever engrossed, served and filed such a document. Taking into account the Trial Court's Findings following the July 19, 1990, hearing on Appellant's Motion for a Settled Statement, this Court "determined" in an Order filed August 7 and 8, 1989, hearing was "correct and no further proceedings to Correct the Record (were) warranted." The cited "testimony" is not part of the record.

During the 1989 Trial Ward did testify the Access Road burdened with the Easement (Ex 2-A)did not appear on his 1975 Photograph (Exhibit E) as a continuous road. Counsel for Respondent commented the missing portion of the Access Road may have existed but did not appear on the Photograph (due to altitude and aspect of the plane, the angle of the camera, etc.) and the Trial Court agreed the missing portion may not have been photographed. Ward ac-

knowledged there could be some distortion from the apex of the camera.

Appellant uses this portion of the testimony to support her contention "the mid-portion was constructed 'last month' when VOrd 'was up there with a bulldozer---re-grading the roads.'" As previously noted, the record supports Van Orden merely cleared brush and filled in gullies as part of necessary and routine maintenance and repairs he was entitled by law to perform. (Burris v People's Ditch Co (1894) 104 Cal. 248, 252.) There is no showing the repairs six months prior to trial affected the "substance" of the easement, (Kreiger v Pacific Gas & Electric co (1981) 119 Cal. App.3d.137, 145-146.)

Van Orden I established the Access Road, the only feasible Access Road running from the southern 80 acres into the Northern 80 acres, was in existence in rough form dating back to the late 1920's.

It was bulldozed and improved. and in the form generally depicted on the Plat Map drawn by Brown in 1989, prior to Appellant's purchase of the property in May of 1970. (Van Orden I,supra, typed Opn. p. 12.) The record does not support Appellant's contention that Van Orden unlawfully altered the Access Road just prior to the 1989 Trial.

"POINT IV"

Appellant contends she never saw the two questions embodied in the "Special Verdict" form submitted by Respondents and read to the Jury just prior to deliberations, the questions were submitted by Respondents and Appellant voiced no objection (on the record) to them. After the Jury had begun deliberations Appellant asked where the questions had come from and wanted to know why she had not been able to submit questions, The court advised her she could have.

It is likely the Special Verdict Form was approved by the court during the Conference on Instructions, which Appellate attended earlier in the day the matter was submitted to the Jury. A Special Verdict can be submitted to the Jury at the behest of either party or on the Court's own motion. The determination whether or not to submit a Special Verdict to a Jury rests in the Trial Court's sound discretion and no abuse of discretion is demonstrated here. (Code Civ. Proc., #625; Gherman v Colburn (1977) 72 Cal.App.3dd 544, 590; Wiencke v Bibby (1910) 15 Cal.App. 50,55)

Appellate maintains the Special Verdict was really all that the Jury was given to consider.[8]

8/ The special Verdict submitted to the Jury read as follows: "We the Jury in the above entitled cause, find the following Verdict on the questions submitted to us: Question No.1: How wide shall the easement (Fn. continued)

The concluding instruction --BAJI 15.52 (Concluding Instruction --Special Verdict) was read to the Jury just prior to the two questions contained in the Special Verdict Form. BAJI 15.52 instructed the Jury to "(a)nswer the questions according to instructions on the (Special Verdict) Form and all instructions of the Court...." (emphasis added.)!

The Jury was further instructed to "consider all of the instructions as a whole" in reaching their Verdict (BAJI 1.01), in light of all the evidence received, across the Plaintiff's 80 acres be ? Answer: The easement shall be _____feet in width, Question No. 2: Is the extent of the Right of access, that is, use by vehicular traffic for ingress and egress, reasonably required considering all the uses for which the property is adapted and available and consistent with prior use ? Answer 'yes' or 'no'. Answer:____."

according to the value the Jury accorded the evidence (BAJI 1.00 & 1.00.5). The Jury considered the evidence and the law set out in the applicable Instructions in arriving at the answers provided on the Special Verdict Form. The Jury was not given the Special Verdict Form to consider in a vacuum.

The Special Instruction submitted by Respondents advising the Jurors of the effect of Van Orden I, which Appellant maintains she was "unaware of." was obviously approved during the instruction conference, was factually correct and given, as indicated, by the Trial Judge.

Appellant suffered no conceivable harm by the fact the court instructed the Jury pursuant to Respondents' BAJI Instructions and rejected Appellant's BAJI Instructions where they were duplicative. The Jury never asked to look at the written instructions, so they never saw it was Appel-

lant's duplicates that were rejected. The Jury would have no way of knowing Appellant had submitted duplicate Instructions because the Jury would not have been provided duplicates. If Appellant wanted reasons stated why the Court rejected certain of her other Instructions she should have asked for the Court Reporter to be present during the Instruction Conference so there would be a record for this Court to review. Appellant has established no prejudice.

"POINT V"

Appellant erroneously refers to record testimony from Van Orden I in support of her next contention that the testimony as to the width of the easement at the time of Implication does not support the judgment. All the relevant testimony on the issue on Remand from Van Orden I is contained in the Clerk's and Reporter's Transcripts of the August 7 & 8,

1989, Retrial, and appropriate Exhibits. That is the Record considered by this Court. Many of the Exhibits referenced in this portion of the Brief (and elsewhere) were not marked and entered as Exhibits during the 1989 Trial, despite the frequent urging of Respondents' Counsel and the Court that Appellant do so. Even Appellant acknowledged this was creating a problem. [9] Often Appellant's "Exhibits" (e.g.,Photographs, Maps etc.) were simply shown to the witness Appellant was questioning. In many instances they were unidentified in and unidentifiable from, the Record, even in context of testimony in which the "exhibits" were presumably pertinent.

9/ Ms. Rabida:"The problem (is); your Honor, we have different Maps, and they haven't been actually described to the Court of Appeals. And the Map--I will save that for my testimony.

It is not the responsibility of the Appellate Court to match unidentified Exhibits to Record testimony, nor was it the responsibility of the Trial Court to make a satisfactory record to facilitate any later Appellate Review Appellant might seek. "'A layman with resources who insists upon exercising the privilege of representing himself must expect and receive the same treatment as if represented by an attorney --no different, no better, no worse'..." (Lambardi v Citizens Nat. Trust etc. Bank (1955)137 Cal.App. 2d 206, 209; Taylor v Bell (1971) 21 Cal.App.3d 1002, 1009'; Doran v Dryer (1956) 143 Cal.App.2d 289, 290.) Otherwise ignorance is unjustly rewarded. (Ibid)

Again, the import of Appellate's argument on this issue seems to be the Access Road did not exist at the time she acquired her property in 1970, therefore it had no width, That issue was finally decided

against her in 1985; again we cite Van Orden I.

"POINT VI"

Appellate next claims that Van Orden had no knowledge of her property prior to his traveling on it in 1971, therefore he had no knowledge of the use to which the land was put prior to the time she acquired the property in May 1970. Actually, upon cross-examination by appellant, Van Orden recalled he likely travelled across Appellant's property sometime in the summer of 1970, probably June of 1970, i.e. a month after Appellant purchased the southern 80 Acres. Van Orden testified on his first trip the road had been "cleaned up with a bulldozer, but not freshly made."

In upholding the Lower Court's determination that respondents held an Easement by Implication in Van Orden I, the Court, in effect, affirmed that all the conditions precedent to such a finding were

satisfied. The road was used by Van Orden, and by implication the other Respondents similarly situated in the upper 80 acres, for access to their northern parcels on a limited, recreational basis. Van Orden I established the road was subject to Access for recreational use as far back as 1929. (Van Orden I, supra typed Op. p.2.)

On Remand the Trial Court was directed to establish the width of the Implied Easement. In so doing it was directed to take "additional evidence regarding the (width of) the existing road," taking into account "the nature of the traffic carried by the road after it was bulldozed (in 1970)" and "the nature of the use to which it was put at the time the Easement by Implication arose." (Van Orden I supra, typed, Opn. pp18-19) a 30-foot Easement on an "Off-Site Access Road" was required by the Kern County Parcel Ordianace; the 30-foot Easement established by the Jury is supported

by substantial evidence. As established, the Access easement is the minimum width required to satisfy an applicable Local Ordinance, and is consistent with it's prior use.

"POINT VII"

Appellant argues the Trial court erred in refusing to confine the testimony at Trial to the condition of the road as it existed in 1970, i.e. the time the Easement by Implication arose. As previously explained, the Court did not err in receiving testimony as to the width of the Access Road as it presently existed, or testimony as to pertinent Ordinances. As we stated, the present uses, interveening uses, and reasonably to be expected uses of 1970, are relevant to the width of the Implied Easement at the time it was acquired in 1970.

As this Court stated in Van Orden I:

"'"(w)henever an easement is implied, re-

gardless of how the implication arises, the extent of it's use is not neccessarily limited to the prior use made of the property by the grantor, the Court in each case examines all of the facts and circumstances surrounding the transaction to give effect to the actual intent of the parties. The prior use of the easement, or the nature of the Easement as evidenced by a Map or by representations, are persuasive circumstances that usually lead to the conclusion that the prior or represented use is the limit of the future use of the Easement, However, such use is not always so limited. In some cases the court measures the future use of the easement by the future utilization and development of the dominant tenement which might reasonably have been expected by the parties."(citation.)..."The Implied Easement is not confined to the precise use at the time of transfer? i.e., it may have

a broader scope that the quasi-easement on which it is based. The test is the Intent of the Parties as to the use reasonaly contemplated." (Citations.)' (Horowitz v Noble (1978) 79 Cal.App3d 120, 133-134; see also George v Goshgarian (1983) 139 Cal.app.3d 856, 861-863.)" (Van Orden I, supra typed Opn. p. 11)

In Kytasty v Godwin, supra 102 Cal. App.3d 762, 771772, the appellate Court explained: "where the easement is acquired by an Implied Grant, the scope of the easement is measured by the extent the property was obviously and permanently used at the time when the transfer was completed. (CCP # 1104)...the extent of an easement by Implied Grant must be inferred from all of the circumstances of the case among which the existing and reasonably to be expected uses are considered (Citations). a number of California Cases have discussed the uses permitted and suggest the

Intent of the Parties should be controlling.(citation)....The question as to the amount of property subjected to the Easement, the width of the existing Road or Easement, is one of fact for determination by the Trial Court.(Citation)."
(Ibid., emphasis added)

In Kytasty the Appellate court held the evidence "(did) not support a finding the Easement used or reasonably expected for future use of the dominant tenement was 60 feet wide," reversed the Judgmemt on that point and remanded for further proceedings. (Kytasty v Godwin, supra, 102 Cal.App.3d 762, 772, 774, emphasis added.) Here, in addition to the evidence recited at length , the testimony of a Senior Planner in the Kern County Planning and Development Services, and the applicable Section of the Kern County Parcel Map Ordinance established the Off-Site Access Road here required a minimum 30-foot Ease-

ment. this is what was reasonably required as of 1970, for the "future use of the Dominant Tenement...." (Id, at p. 772)

"Points" VIII-XIX

These "Points" cover matter that could have been raised or were resolved (directly or impliedly) contrary to Appellant's position in Van Orden I, or are addressed in Points I-III and V-VII of the Instant Opinion.

The Judgment is affirmed.

Brown (Sno. A.)
Brown, J.*

WE CONCUR:

Best
Best, P.J.

Buckley
Buckley, J.

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* Retired Presiding Judge of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

Court of Appeal Fifth Appellate District

Filed Mar. 29, 1985

by Kevin A. Swanson-Clerk, Deputy

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIFTH APPELLATE DISTRICT

JOSEPH B. VAN ORDEN,et al.,	)	5 Civil No.
Plaintiffs, Cross-	)	F002875
defendants and Respondents,	)	(Super. Ct.
v.	)	No. 148546)
PAT ROSE,	)	OPINION
Defendant, Cross-	)	
complainant, and Appellant.	)	

APPEAL from judgment of the superior Court of the County of Kern, John M. Stanton, Judge. Affirmed in part; reversed in part.

Sylvia T. Whitmore, Levin, Ballin, Plotkin & Zimring, Stuart D. Zimring and Nancy O. Marutani for Defendant, Cross-complainant and Appellant.

Gerald Goldfarb and Harry M. Reynolds

for Plaintiffs, Cross-defendants and Respondents.

Defendant Pat Rose appeals from a judgment in favor of plaintiffs on the complaint and in favor of plaintiffs and cross-defendants on the cross-complaint.

STATEMENT OF THE FACTS

From 1929 until 1969, the southeast quarter of section 11, Township 29 south, Range 33 East, Mount Diablo Meridian was owned by Jeremiah and Phyllis M. Mc Carthy. During this period, the Mc Carthys utilized at least two clearly marked and defined trails to travel from the southern half to the northern half of the property for hiking, horseback riding and other ranching purposes.

In October 1969, the Mc Carthys sold this property to Robert C. Monroe. Early in 1970, Floyd Walls Jr., a licensed engineer, was hired by Monroe to do surveying and road work on the subject property. Working with

Allan Whitlock, Walls walked the property, observing an "undesirable road" or "horse and buggy trail" which generally followed the terrain, and was visible in some places but obscured by growth and washed away in others. Using a bulldozer, Walls modified this existing road, following it fr4om the western border of the southern 80 acres, north into the northern 80 acres and then south into the southern 80 acres again. Walls completed this road work in February or March 1970; the surveyor prepared his map after the road had been completed.

Responding to an advertisement concerning the sale by Monroe of the property, defendant, in May 1970, visited it for the purpose of viewing the southern 80 acres, accompanied by Monroe's agent, Russ 1/ Milburn, among others. Milburn showed defendant a surveyor's map of the quarter

1/ Russ Milburn and Stoye Milburn appear to be the same person.

section, which depicted a road entering the southern 80 acres from the west, running north into the northern 80 acres in a bell-shaped-curve, then continuing back south into the southern 80 acres. Thie map receited, inter alia, "these two parcels 80 acres--22(,)600(.)00 with roads as indicated." On the day that defendant viewed the property, and during subsequent conversations, Milburn discussed with her the fact that the road depicted on the surveyor's map would provide access to the northern 80 acres, and defendant never voiced any objection. In May 1970, defendant purchased the southern 80 acres of the property.

On Sept 28, 1970, the Milburns purchased the northern 80 acres of the subject property from the Monroes. Plaintiff Joseph Van Orden purchased 40 fo the 80 acres from Milburn in 1971. When Van Orden first visited the property in 1971, he utilized the

road that passed through defendant's property from west to north for access to his (Van Orden's) property, and there was no gate preventing use of said road. Van Orden visited his property about two times a year, including a visit in late summer 1972, to show it to a prospective buyer. Although he noticed a gate in 1972, the gate was not locked until 1973. The only public road in the vicinity of the subject property is Piute Mountain road. Plaintiffs' property does not abut Piute Mountain Road, which is about one-fourth of a mile distant at the nearest points, to the north and to the west. The land to the west of plaintiffs' land is controlled by the Bureau of Land Management (BLM), and is very steep and impassable. The land to the north of plaintiffs' property is very steep with large boulders and numerous ravines. East of Plaintiffs' property is Sequoia National Forrest wilderness land.

Three or four years prior to the time of trial, engineer Walls walked plaintiffs' property in order to determine the feasibility of constructing an access road which did not cross defendant's property. Building a road from the north would be prohibitively expensive because of the need to blast through rock. A road constructed from the west would cost about $50,000 to build. At the time of trial, new county regulations would increase the cost of a western access road to $100,000. Plaintiff Van Orden never investigated obtaining an easement over BLM land to the west, alleging it would have been pointless, since no road could be built there.

Defense Case

When defendant first visited the southern 80 acres in May 1970, with (among others) Milburn, there were no roads on the property. When Milburn showed her the map depicting a bell-shaped road extending from

the southern 80 acres into the northern 80 acres, she objected, and stated that she did not want a road crossing her property into the northern 80 acres. Defendant had originally intended to purchase only 40 acres (on the eastern side), but purchased the western 40 acres to insure her privacy. Milburn assured her that there would be no need for any road passing through her property, and that some teachers who also wanted privacy, were purchasing the northern 80 acres.

An access road to defendant's property from the west was constructed in May 1970, In September 1970, John E. Varin was hired by Milburn to build a road from the southern 80 acres into the northern 80 acres. When Varin began bulldozing, defendant appeared and ordered him to stop and get off her property, but Varin thought he was on Milburn's land, so continued working. Varin did not follow existing roads or

trails in constructing the road into the northern 80 acres, and did not see any road as supposedly built by Walls. After his initial confrontation with defendant, Varin became her friend and did other road construction work for her, In 1971, when he went to defendant's property to do some work, the road was blocked by a locked gate, and defendant's brother had to come and unlock it so Varin could get past . Defendant first put up the locked gate in September 1970. Her locks were shot off twice, and the gate was broken once, but defendant replaced the locks each time. Defendant's friend Hope Gentry visited defendant's property in 1971, 1972, 1973, or 1974 and 1975 or 1976, and each time the gate was locked with a padlock and chain.

Donald E. Ward, a land surveyor and civil engineer, visited defendant's property in August 1980. Walking on BLM land west

of the subject property, Ward concluded that a road could be constructed across BLM land from the Piute Mountain Road southeast to plaintiffs' land for between $2,000 to $4,000.

Lewis A. Boll, local district manager for BLM, stated that if all federal requirements were met, the BLM office in Sacramento would grant an easement over BLM land.

James Rickett, general manager of Western Photo Air, took an aerial photo of the subject area on July 19, 1975. Comparing that photo to other photos of the same area taken in 1940, 1962, April 1970 and July 1970, Rickett could not observe any road crossing defendant's property and entering plaintiffs' property until the 1975 photo.

DISCUSSION

I. There was substantial Evidence to support a Finding of Implied Easement

"The law with regard to implied easements is not uncertain and was most amply summarized by (the) court in Orr v Kirk (1950) 100 Cal.App.2d 678, at page 681... "'The elements necessary to create a "quasi-easement" or grant by implication, upon serverance of unity of ownership in an estate, are: (1) a separation of title (which implies unity of ownership at some former time as the foundation of the right); (2) necessity that before separation takes place the use which gives rise to the easement shall be so long continued and obvious as to show it was meant to be permanent; and (3) the easement must be reasonably neccessary to the beneficial enjoyment of the land granted. (Citation) The law does not favor the implication of easements . Such implication can only be made in connection with a conveyance, and in view of the rule that a conveyance is to be construed against the grantor, the court will imply an ease-

ment in favor of the grantee more easily than it will imply an easement in favor of a grantor. Whether an easement arises by implication on a conveyance of real estate depends on the intent of the parties, which must clearly appear in order to sustain an easement by implication. In order to determine the intent, the court will take into consideration the circumstances attending the transaction, the particular situation of the parties, and the state of the thing granted. (Citation.) The purpose of the doctrine of implied easements is to give the effect to the actual intent of the parties as shown by all the facts and circumstances....'"(Kytasty v. Godwin (1980) 102 Cal.App.3d 762m 769.)

Defendant attacks the trial court's finding of implied easement in a number of particulars, considered below. In connection with these attacks, and throughout her briefs on appeal, defendant argues that the

evidence was insufficient to support the factual findings of the court, In this regard, it should be noted that where the trial court's findings are challenged on sufficiency of evidence, the appellant bears the heavy burden of showing that there is no substantial evidence whatsoever to support those findings, (Division of Labor Law Enforcement v. Transpacific Transportation Co. (1979) 88 Cal.App.3d 823, 829.) The reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact, (Foreman & Clark Corp. v. Fallon (1971) 3 Cal.3d 875, 881.) "' The power of the appellate court begins and ends with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact,'" (Ibid.) If the appellant contends that some particular issue of fact is not sustained, she is "'required to set

forth in (her) brief all the material evidence on the point and not merely her own evidence. Unless this is done the error assigned is deemed waived,'" (Ibid.) "Substantial evidence means evidence which is of ponderable legal significance--evidence that is reasonable in nature, credible and of solid value," H. Russell Taylor's Fire Prevention Service ,Inc. v. Coca-Cola Bottling Corp. (1979) 99 Cal. App.3d 711,726.) "The trier of fact is the sole arbiter of all conflicts in the evidence, conflicting interpretations thereof, and conflicting inferences which may be reasonably may be drawn therefrom; is the sole judge of the credibiliity of witnesses; may disbelieve them even though they are uncontradicted if there is any rational ground for doing so, one such reason for disbelief being the interests of the witnesses in the case; and , in the exercise of a sound legal discretion, may draw or

refuse to draw inferences reasonably deducible from the evidence." (Johnson v. Pacific Indemnity Co. (1966) 242 Cal.App. 2d 878, 880.) "(T)he appellate court ordinarily looks only at the evidence supporting the successful party, and disregards the contrary showing. (6 Witkin, Cal. Procedure ((2d ed. 1971)) #249, at p. 4241.)" (Nestle v. City of Santa Monica (1972) 6 Cal.3d 920, 925.) The testimony of a single witness, even a party, is sufficient to support a judgment, (In re Marriage of Mix (1975) 14 Cal.3d 604, 614.)

A Separation of Title

The trial court found, inter alia, that the original owners of the 160 acres in question herein conveyed them (in Oct. 1969)"...to ROBERT C. MONROE, MARY ALICE MONROE and A FLETCHER HARRIS (herein 'MONROE'). (sic)" The trail court further found that "MONROE (sic) conveyed the (southern 80 acres) to PAT and RAYMOND

ROSE(,)" and then "conveyed the (northern 80 acres) to STOYE and ANNA MILBURN. The court also found that plaintiffs "are the present owners of various parcels in the (northern 80 acres)." defendant now contends that these findings do not include "a finding as to the disposition of A. Fletcher Harris's (sic) interest."

It must first be pointed out that the trial court, in its recitation of findings, specifically referred to Robert C. Monroe, Mary alice Monroe and a. Fletcher Harris collectively as "'MONROE.'" in finding No. 3, so that the subsequent references in findings 6 and 8 to "'MONROE'" as a grantor included the interest of all three of the 1969 grantees. Since the findings thus demonstrably did account for the interest of A. Fletcher Harris, defendant's contention in this regard is patently specious.

Further, it is apparent that plaintiffs' counsel prepared the findings of fact for

the court's signature with uncritical reference to the original complaint, since there was absolutely no evidence at trial that Harris was ever involved as a grantor or grantee in any of the relevant land transactions. By the time of trial, plaintiffs had already obtained an order that the chain of title of the subject properties was without substantial controversy and did not include A. Fletcher Harris, but evidently forgot this little detail when preparing the findings for signature after trail.

A similar problem arose in Estate of Moore (1953) 143 Cal.App.2d 64, wherein the "draftsman (of the trial court's findings) went through the allegations of the pleadings paragraph to be true or untrue." (Id., at pp. 77-78.) This let to "numerous conflicts and some ertroneous findings as to evidentiary facts." (Id., at p. 78.) The Court of Appeal held that the erroneous

findings resulting from the poor draftsmanship were not prejudicial. since "' (a) reviewing court will liberally construe findings in support of the judgment. Any uncertainties will be construed so as to uphold rather than defeat the judgment. (Citation.) In reviewing the sufficiency of findings to support a judgment, the court will regard the ultimate facts found.' (Citation.) The findings as to the evidentiary facts may be ignored. (Citations)" (Ibid.)

In the present case, if there are any uncertainties in the findings bearing upon separation of title because of the presence or absence of mention of A. Fletcher Harris, the findings should be liberally construed to uphold the judgment and to regard the fact of separation of title as found by the trial court. The evidence at trial supports unity of ownership in the Mc Carthys, followed by conveyance to the Monroes, then to defendant (southern 80 acres) and the

Milburns (northern 80 acres) and successively to the other plaintiffs, all without uncertainty or contradiction.
Under these circumstances, it cannot prejudice defendant to interpret the findings in consonance with the record.

B. Long and obvious Use prior to Separation

Defendant appears to have abandoned the contention, made in her opening brief, that the findings relating to prior use are insufficiently definite to support the judgment, since her reply brief merely asserts that the findings are not supported by the evidence, without any inadequacy as to the findings themselves. Defendant argues that the sole evidence of prior use --the declaration of Phyllis Mc Carthy-- established that the trails which were ultimately bulldozed into the north/south "bell-shaped" road were used by the Mc Carthys for ranching and recreational purposes, and thus will not support an

implied easement for ingress and egress. The distinction between travel into the northern 80 acres for "ranching and recreational" purposes and travel into the same land for "ingress and egress" is a subtle one. There was no evidence produced at trial to indicate the "purpose" for which plaintiffs visited their property, although Joseph Van Orden's testimony that he went there about twice a year strongly suggests that his interests were recreational.

In any case,"' (w)henever an easement is implied, regardless of how the implication arises, the extent of its use is not necessarily limited to the prior use made of the property by the grantor, the court in each, examines all of the facts and circumstances surrounding the transaction to give effect to the actual intnet of the parties. The prior use of the easement, or the nature of the easement as evidenced by a map or by representations, are persuasive cir-

cumstances that usually lead to the conclusion that the prior or represented use is the limit of the future use of the easement. However, such use is not always so limited. In some cases the court measures the future use of the easement by the future utilization and development of the dominant tenement which might reasonably have been expected by the parties.' (Citation.)...'The implied easement is not confined to the precise use at the time of the transfer; i.e., it may have a broader scope than the quasi-easement on which it is based. The test is the intent of the parties as to the use reasonably contemplated.' (Citations.)" (Horowitz v Noble (1978) 79 Cal.App.3d 120,133-134; see also George v Goshgarian (1983) 139 Cal.App3d 856, 861-863.)

Ignoring the dposition testimony of Milburn,[2] the trial court had the fol-

2/ Treating Milburn as an adverse party pursuant to Code of Civil Procedure section (Fn. continued.)

lowing evidence regarding the intent of the parties as to the scope of the easement crossing defendant's property: Defendant admitted that Milburn had shown her the "Whitlock map" which depicted the subject road and receited "with roads as indicated," and that Milburn told her that her property would be subject to those roads. Defendant was aware that the property to the north of hers was being purchased by others. Engineer Walls testified that he constructed the subject road in early 1970. prior to defendant's first visit to the property, and that he had been hired by 2016, subdivision (d)(now subd,(e)) (2), which permits the use of deposition testimony of a party "for any purpose" if offered by "an adverse party", appears to have been error by the trial court, Milburn was named plaintiff and an owner of property in the northern 80 acres, and as such shared the interests of the other plaintiffs

Monroe to do the road work. The "Whitlock map" which was shown to defendnt was prepared after Walls had buldozed the access road. Finally, the access road was built following a previous "undesirable road" or trail which Phyllis Mc Carthy established had been used for access to the northern 80 acres for many years, and that this road was the only feasible means of travel from the southern to the northern property. in establishing the easement in dispute. The fact that the other plaintiffs might have sought redress in the future (i.e., had the sought after easement been rejected by the court, other purchasers of land in the northern 80 acres might have sued Milburn, their grantor, for misrepresentation) did not render their positions adverse in the litigation against defendant, Mahoney v. Founders' Ins. Co. (1961) 190 Cal.App.2d 430, cited by plaintiffs, is of no help on this issue, since the depo-

(Fn. continued)

Under these circumstances, it was entirely reasonable for the trial court to conclude that the parties (Monroe and defendant) intended the easement crossing defendant's land to provide access to prospective purchasers of the northern 80 acres. Assuming that the court believed Wall's testimony that the subject road had been constructed prior to May 1970, and that defendant had in fact examined her property prior to purchase, the court may have simply have disbelieved defendant's story of protestations to Milburn, and her claimed failure to observe any roads going into the northern 80 acres. The fact that Monroe caused the road to be constructed prior to the sale of the southern 80 acres

sition testimony admitted pursuant to Code of Civil Procedure section 2016, subdivision (d) (2) in that case was of the principal obligor in a suit by the obligee against the surety. (Id.,at pp 434-435.)

(Fn. continued)

to defendant is alone persuasive evidence that he intended the easement for the ingress and egress of the owners of the northern land, and defendant's intent can be inferred from her purchase after seeing the "Whitlock map," after she physically examined the property and after she was told by Milburn that the access road existed. Contrary evidence of defendant's intent merely raises a conflict which the court, as the trier of fact, resolved in plaintiffs' favor.

Defendant contends that the Milburn deposition contained the only evidence supporting the trial court's implied finding that the parties to the conveyance of the south-

The interests of creditor and debtor are manifestly hostile and adverse, and the surety stands in the position of the debtor as to a default by the latter. (Ibid)

In the present matter, at the point at which Milburn's testimony was offered by

(Fn. continued)

ern 80 acres intended that the "bell-shaped" road provide access to the northern 80 acres, and because Milburn's deposition was inadmissible (see fn. 3), the requisite finding of intent to support the implied easement is contrary to the evidence.

As noted above, the Milburn deposition was not the only evidence of the parties' intent--the circumstances surrounding the transaction , including prior construction of the road, defendant's own description of her interaction with Milburn, and the prior use of the "wagon trail" by the Mc Carthys, all indicate that the Monroes and defendant plaintiffs, he was unambiguously alined in interest with them, and could not be considered adverse except in the most speculative sense. As noted in the main discussion, the absense of Milburn's testimony does not rob the trial court's findings of evidentiary support, and the error in admitting it was therefore nonprejudicial.

must have intended that the access easement be reserved with regard to the northern 80 acres. Defendant's evidence to the contrary simply has no significance in a sufficiency analysis on appeal.

D. Reasonable Necessity

The "reasonable necessity" which will support an easement by implication is "the degree of necessity...(which) renders the easement necessary for the convenience and confortable enjoyment as it existed when the severance was made.'" (Leonard v. Haydon (1980) 110 Cal.App.3d 263, 268) A factor that may be considered in determining reasonable necessity is the cost to the party seeking the easement of providing a substitute on their own property. (Ibid.)[3] Whether the reasonable necessity

3/ In Leonard, the jury was instructed that the low cost of an alternate route could be considered as evidence that an easement by implication was not reasonably

(Fn. continued)

exists to support an easement by implication is a question of fact. (Id.,at p.274.)

In the present case, ample evidence supported the trial court's finding that an easement as sought by plaintiffs was reasonably necessary for the use and enjoyment of the northern 80 acres. Phyllis Mc Carthys declaration stated that the route followed by the disputed road was the only fesible means of access to the northern land. Joseph Van Orden testified that the only alternate route--from the west over BLM land--would involve costs of from $50,000 to $100,00. Engineer Walls corroborated this testimony. as discussed in relation to each defendant's sufficiency of evidence necessary. (Id.,at p. 268.) The jury's verdict that no easement by implication arose was supported by substantial evidence that there had been no long continued and obvious prior use of the disputed driveway, (Id., at pp 266-267)

arguments, her evidence to the contrary merely created a conflict the resolution of which in plaintiffs' favor by the trier of fact cannot be overturned on appeal. Clearly, there was substantial evidence presented to the trial court to support the finding of an implied easement.[4]/

4/ Defendant further contends that the trial court erred in concluding that plaintiffs were entitled to an easement by necessity over defendants property. Since we have concluded plaintiffs are entitled to an easement by implication over defendant's property, this contention will not be discussed; an easement by necessity is more difficult to prove than an easement by implication since it requires a finding of strict necessity (as compared to reasonable necessity). Moreover, unlike an easement by implication, an easement by way of implication, an easement by necessity ceases when the necessity ends. (3 Witkin, Summary of

(Fn. continued)

II. The Trial Court did not err in locating the Easement by Implication along the Road bulldozed by Walls in early 1970

Defendant appears to contend that the easement as located by the trial court--"follow(ing) the center line of the access road as said road existed on May 25, 1970"--is different than as shown on the "Whitlock map", and that this discrepancy involves a relocation of the easement by the court which is unsupported by the evidence.

As pointed out by plaintiffs, the access road as it existed on May 25, 1970, and the road shown on the "Whitlock map" are one in the same, since according to testimony of engineer Walls, who built the road, sur-

Cal. Law (8th Ed. 1973) #362, p. 2058; Irvin v Petifils (1941) 44 CalApp.2d 496, 500; Smith v Skrbeck (1945) 71 Cal.App.2d 351, 360.)

veyor Whitlock prepared the map depicting the road after Walls had bulldozed it. The trial court found that Walls had constructed the road, that the map depicted the road, and that defendant was on notice of that same road when she purchased the property after May 1970. There was simply no "relocation" of the access easement based upon the evidence accepted as true by the trial court.

III. The Trial Court did not err in ruling that Defendant had not extinguished ' Plaintiffs Easement by adverse Possession.

An easement may be extinguished by the owner of the servient tenement by acts adverse to the exercise of the easement for the period required to obtain adverse possession. (Popovich v O'Neal (1963) 219 Cal.App.2d 553, 556.) Whether the owner of the servient tenement prevented the owner of the dominant tenement, by hostile or adverse acts, from using the easement for

the prescriptive period is a question of fact. (Ibid.)

In the present case, plaintiff Joseph Van Orden testified that a gate first appeared across the disputed access road sometime in 1972, and that the gate was first locked in 1973. The trial court found that defendant "attempted to obstruct access" to the easement "(b)eginning in 1972." The present action was filed on August 3, 1977. If the court found that defendant's obstructions began after August 3, 1972, then even a continuous interference with plaintiffs' use of the access road would not have extended for the necessary five years to extinguish the easement by prescription. The court further found, based on evidence that plaintiffs continued to use the road to reach their properties after 1972, that "(t)he access road was not obstructed continuously for any five-year (sic) period.

Defendant's attempt to supplant the five-year ½rescriptive period with the three-year limitations period of Code of Civil Procedure section 338 [5] is disingenuous. The cases cited by defendant involved actions to recover damages for the closing of a public street (Phillips v. City of Pasadena (1945) 27 Cal.2d 104, 105-106) and to abate and recover damages for a trespass (Carbine v. Meyers (1954) 126 Cal. App.2d 386, 387). To the extent that the present judgment purports to award damages or abate a nuisance (it does neither), the issue of the commencement of the applicable limitations period might be germane, but this would have no effect on the rights of

5/ Code of Civil Procedure section 338 provides in relevant part: "

"Within three years:

".....

"2. An action for trespass upon or injury to real property.

the parties vis-a-vis the disputed easement.

IV. The Trail Court's selection of a 30-foot Width for the Implied Easement is not supported by the Evidence

Defendant also complains that the trail court's selection of a 30-foot width for the implied easement is not supported by the evidence, In Kytasty v. Godwin, supra, 102 Cal.App.3d 762, the owner of the servient tenement objected to the trial court's finding that the easement burdening her land should be 60 feet wide.* The court of appeal notes that the amount of property used by an easement is a distinct issue from the nature of use made of the easement, and that "the concern of the court in any case is not to increase the burden of the easement as it respects the servient tenement (citations)." (Id.,at p. 771, fn. omitted.) Because witnessed had testified that the road in dispute was used for single vehicle traffic, the road had been graded by a

bulldozer, and because state statute prescribed the minimum width for 2-lane roads of 20 feet, the appellate court ruled that an easement wider than 12 feet would be unreasonable. (Id., at p. 772.) The matter was remanded to the trial court for a new finding on the width of the implied easement, the appellate court stating that "(i)n the absence of additional evidence." the trial court could "set the maximum width at any amount it reasonably determines is necessary to accommodate single vehicle traffic or the width of the bulldozer grading there which (the owner of the servient tenement) reasonably knew would traverse her...property." (Ibid.)

In the present case, there is even less evidence in the record regarding the width of the road bulldozed by engineer Walls than was available to the court in Kytasty. No witness spoke of the roads width, or the nature of traffic carried by the road

after it was bulldozed. Under these circumstances, in considering that the 30-foot width approved by the trial court is 10 feet wider than the statutory minimum for a 2-lane highway, it is necessary to remand the matter to the trial court on this issue for the taking of additional evidence regarding the existing road, and the nature of the use to which it was put at the time the easement by implication arose.

CONCLUSION

The judgment of the trial court insofar as it found an easement by implication is affirmed. Judgment is reversed as to the finding that the implied easement was 30 feet in width, and remanded to the trail court for further proceedings consistent with this opinion. The parties to bear their own costs and attorney fees on this appeal.

Vanda Wall

J.*

WE CONCUR:

Hanson (P.D.)
Acting P.J.

Woolpest
J.

---

* Assigned by the Chairperson of the Judicial Council.

SUPREME COURT
FILED
NOV. 20, 1991

Fifth Appellate District No. F012692
S023351

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

JOSEPH B. VAN ORDEN, Respondent

v.

PATRICIA ROASE RABIDA, APPELLANT

Appellant's petition for review DENIED

LUCAS

Chief Justice

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF KERN

Date:Friday,April 24, 1981

Court met at 10:00 A.M. Department No.___

Present: Hon JOHN M. STANTON,JUDGE

L.KEELING, DEPUTY CLERK

NO REPORTER NO BAILIFF

TITLE	COUNSEL
JOSEPH B VAN ORDEN,et al.,	Virgil Roberts
vs.	
PAT ROSE, et al.,	Gary L. Symonds

NATURE OF PROCEEDINGS ACTION NO 148546

NOTICE OF INTENDED DECISION

The facts are not in particular dispute and will not be set forth in any great detail. Essentially, the facts are as follows:

Sometime in the late 1960's or very early 1970, Robert Monroe and his wife owned property in the area that we will refer to as the "Piutes" (This property is located north of Tehachapi and south of

APPENDIX D

Lake Isabella area in Kern County. It is high country and very rugged.) The closest public road is the Piute Mountain Road. They proceeded to subdivide the porperty with the assistance of a man by the name of Milburn; and did so without complying with The Subdivision Map Act. They did, however, prepare a Map showing various Existing and Proposed Roads. Defendant Rose and her husband bought the lower 80 acres by deed dated May 25, 1970. The Roses had seen the Map and in fact, bought with some reference to it. Mrs Rose may have made some complaints to Milburn. Nevertheless, the Map continued to exist in its original state and, in fact, Plaintiff, Van Orden bought the so-called "upper" 80 acres about a year later slso with reference to the Map.

Thereafter, troubles began to arise between Mrs. Rose and the Van Ordens. Chains were put across the easement, tren-

ches dug, and locks placed. Even so, neither side claims to use any of the total 160 acres more than a few times a year,

Defendant attempted to show that a road from Van Orden's property could be constructed across BLM Land to a public highway, but failed to prove whether BLM would grant such a right-of-way and, if so, what conditions would be attached.

When the Roses bought the "lower" 80, they had seen the Map and knew of the existence of the access road shown on that Map to the "upper" 80. Tfhey, therefore, took subject to the implied easement of ingress and egress from the "upper 80". (See Day v. Robinson 131 CA2d 622)

Defendant Rose is permanently enjoined and restrained from interferring with plaintiffs' easement across her land. Such right shall include the right of plaintiffs to go upon the Rose property

for the purpose of maintaining the right-of-way and making it usable, The easement shall follow that drawn on the Map and shall be of such width as to permit cuts and fills where reasonably necessary to permit access.

Neither side is entitled to damages from the other.

Let judgment be entered accordingly.

Plaintiffs to prepare Findings and Conclusions, if requested.

HARRY M. REYNOLDS
ATTORNEY AT LAW
Post Office Box 7831
Van Nuys California
91409
(213) 344-8022
Attorney for Plaintiffs

FILED 83 JUN 1,
ENTERED JUN 2 1983
BOOK 713 PAGE 116
Entered 87

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF KERN

JOSEPH B. VAN ORDEN, et al., Plaintiffs -v- PAT ROSE,(Rabida) et al., Defendants	NO.148 546 JUDGMENT
PATRICIA S. ROSE,(Rabida) Cross-Complainant, -v- ROBERT C MONROE ,et al., Cross-Defendants.	

1. Plaintiffs are awarded judgment on the

first, second, third and fourth causes of action of the complaint.

2. Plaintiffs and Cross-Defendants are awarded judgment on the cross-complaint.

3. Plaintiffs are granted an implied easement across Defendant ROSE'S property said easement shall be 30 feet wide and shall follow the center line of the access road as said road existed on May 25, 1970. Said easement is a burden on the S ½ of SE ¼ and is appurtenent to and for the benefit, use and enjoyment of the owners of the N ½ of SE ¼.

4. Title to the easement is quieted in Plaintiffs. Defendant ROSE has no estate right, title or interest in and to said easement except the right to freely pass over said easement for ingress and egress to her proeprty.

5. Defendant ROSE, her agents, employees, and/or assaigns are permanently enjoined and restrained from interferring, in any

manner whatsoever, with the peacefull use and enjpyment of said easement by plaintiffs. their agents, employees, licensees, invites, heirs and /or assigns.

6. Defendant ROSE is ordered, at her expense, to forthwith remove any and all obstructions from said easement and to forever keep said easement road free from obstruction.

7. Plaintiffs are awarded their costs of suit herein incurred.

8. Neither side is entitled to damages from the other.

Let Judgment be entered accordingly.

Dated: May 31, 1983

JOHN M. STANTON, JUDGE

FILED DEC.20, 1983

Entered 91

Harry M. Reynolds
Attorney at Law
Post Office box 7831
Van Nuys California 91409
(213) 344-8022

Attorney for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR FTHE COUNTY OF KERN

JOSEPH B. VAN ORDEN, et al. Plaintiffs -v- PAT ROSE, et al., Defendant	No, 148 546 FINDINGS OF FACT AND CONCLUSIONS
PATRICIA S. ROSE, Cross-Complainant, -v- ROBERT C. MPONROE, et al., Cross=Defendants.	

The above-entitled matter came on regularly for trial on Sept. 3,4 and 5, 1980 and Jan. 5, 1981, in the above entitled court, without a jury, the Hon. JOHN M.

STANTON, Judge presiding. It was actually tried on the above dates.

JOSEPH B VAN ORDEN, CHARLES W. MC GOWAN, III, JAY VAN ORDEN, KENT WARDELL, PATRICIA WARDELL, ALFRED O. KNAPP, BETTY JANE KNAPP AND RUSSELL J. KNAPP (herein collectively referred to as "Plaintiffs") appeared through their attorneys, MANNING & ROBERTS by VIRGIL ROBERTS, and Defendant PATRICIA S. ROSE, appeared through he attorney, GARY L. SYMOND.

Evidence, both oral and documentary, was introduced on behalf of all parties and the cause was argued and submitted for decision. The court, having considered the evidence and heard the arguments of counsel. and being fully advised, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Court finds that:

1. JEREMIAH and PHYLLIS McCARTHY (herein "Mc CARTHY") were the original owners of

the SE ¼ of Section 11,-----consisting of 160 acres more or less. (herein "SE ¼")

2.Unimproved roads or trails from the south ½ (herein "S ½") of SE ¼ to the North ½ (herein "N ½") of SE ¼ have existed since approximately 1929, These roads or trails were used continuously since 1929 by Mc CARTHY and others including various prospectors, ranchers and hunters as a means of access from the S ½ of SE ¼ to the N ½ of SE ¼. These roads or trails are located in the same general area as the roads or trails shown on the map known as the "Whitlock Map". (emphasis added)

3. In October 1969, Mc CARTHY conveyed the SE ¼ to ROBERT C. MONROE, MARY ALICE MONROE AND A. FLETCHER HARRIS (herein "MONROE")

4. Prior to May 25, 1970, FLOYD WALLS, a bulldozer operator, widened and improved the access road from the S ½ of the SE ¼ to the N ½ of SE ¼. In doing so, he generally followed the roads or trails used

by Mc CARTHY and others. On or about May 25, 1970 said road was apparent, obvious and intended to permanently provide access to the N ½ of SE ¼/

5. Between October 1969 and May 25, 1970, the 160 acre parcel was devided into two 80-acre parcels.

6. On or about May 25, 1970, MONROE conveyed the S ½ of SE ¼ to PAT and RAYMOND ROSE. At the time of said conveyance MONROE intended to reserve an easement over the S ½ of SE ¼ for the benifit of the N ½ of the SE ¼ but, through oversight, neglected to do so.

7. Defendant ROSE was shown the "Whitlock Map" prior to her purchase and purchased with reference thereto.

8. On or about September 28, 1970, MONROE conveyed the N ½ of SE ¼ to STOYE and ANNA MILBURN,

9. The Plaintiffs are the present owners of various parcels in the N ½ of SE ¼.

10. The N ½ of SE ¼ is bounded on the W ½ of the north boundary by Bureau of Land Management (herein "BLM") land and on the E ½ of the north boundary by private property, on the west by BLM land, on the east by a segment of Sequoia National Forest and on the south by the Rose property.

11. Beginning in the year 1972, Defendant ROSE attempted to obstruct access to the N ½ of SE ¼ by placing a locked gate across the access road. On several occasions, the locks were broken and the gate knocked down to maintain access to the N ½ of SE ¼ over the S ½ of SE ¼. The access road was not obstructed continuously for any five-year period.

12. The N ½ of SE ¼ is located in high Country and is very mountainous and rugged. The only reasonable means of access to the N ½ of SE ¼ is across the S ½ of SE ¼.

13. The closest public road is the Piute Mountain Road. Defendant attempted to show

that a road could be constructed from the Piute Mountain Road to the Plaintiffs' property across BLM land, but failed to prove whether BLM would grant such a right of way and, if so, what conditions, if any, would be attached.

14. Passage across the S ½ of SE ¼ is reasonably necessary to Plaintiffs' use and enjoyment of their property located in N ½ of SE ¼.

15. Passage across the S ½ of SE ¼ is strictly necessary to the Plaintiffs' use and enjoyment of their property located in N ½ of SE ¼.

CONCLUSIONS OF LAW

1. Defendant ROSE too the S ½ of SE ¼ subject to an implied easement of ingress and egress,

2. The Plaintiffs' causes of action are not barred by latches, by unclean hands or other equitable defenses, or by California Code of Civil Procedure Sections 318, 319,

320, 338(2) or otherwise.

3. Defendant ROSE has not acquired an estate, title or interest in and to the access road by adverse possession, or otherwise.

Dated: Dec. 12, 1983

JOHN M. STANTON, JUDGE

Harry M. Reynolds
Attorney at Law
P.O.Box 7871
Van Nuys Ca. 91309

(213) 344-8022

April 30, 1983

Honorable John M. Stanton
Judge, East Kern Municipal Court
Mojave Branch
1773 Highway 58
Mojave, California, 93501

Re: Van Orden v Patricia S.Rose et al.,

Kern County Superior Court Case No.148546

Dear Judge Stanton:

Enclosed please find revised Proposed Findings of Fact and Conclusions of Law and Proposed Judgment I submit for your consideration.

The modifications and revisions and the reasons therefore are as follows.

1.-----the N½ of the SE¼ is bounded on -- north by BLM land and private property

---To better conform--findings to proof.

2. -----modified to include new Paragraphs

"12" and "13".

---To better conform--findings to proof.

3. -----renumber old Paragraphs"12" and "13" as "14" and "15"

-----place findings in logical sequence.

4. The Proposed Judgment is modified to change the width of the easement from 20 to 30 feet. (emphasis added)

Reason for Change: Kern County Planning Department has informed me that this is the minimum acceptible easement. (emphasis added)

In all other respects, the Proposed Findings of Fact and Conclusions of Law, and Proposed Judgment are identicle to those previously submitted, If you have any questions, please do not hesitate to contact me.

Sincerely,

Harry M. Reynolds

cc: Joseph Wedeen, Esquire

HMR/bhr

FILED Aug.8, 1989

SUPERIOR COURT OF CALIFORNIA

COUNTY OF KERN

Joseph B. Van Orden et al.,) No. 148546
)
Plaintiffs,) Special
)
Patricia Rose aka--Rabida) Verdict
)
Defendant) Entered 105

We, the jury in the above-entitled cause, find the following Special Verdict on the questions submitted to us:

Question No.1: How wide shall the easement across the plaintiff's 80 acres be ?

Answer: The easement shall be 30 feet in width.

Question No. 2: Is the extent of the right of access, that is, use by vehicular traffic for ingress and egress, reasonably required considering all the uses for which the property is adapted and available and consistent with prior use ?

Answer "yes" or "no" Answer: yes

Dated: August 8, 1989 Steve C. Castro
Foreman

APPENDIX H

ENTERED 89 Aug. 16.
BOOK 1069 PAGE 438

SUPERIOR COURT OF CALIFORNIA
COUNTY OF KERN

Joseph B. Van Orden, et al.,	)	
Plaintiffs,	)	No. 148546
v.	)	
Patricia Rose aka Patricia Rabida,	)	JUDGMENT ON SPECIAL VERDICT
Defendant	)	ENTERED 106

Plaintiffs are awarded a thirty foot (30') easement across the defendant's land located in the S½ of SE¼ of Section 11, Township 29S.,Range 33 E., Mount Diablo Base and Meridian. The easement is for the benifit of the owners of the property located in the N½ of SE¼ of Section 11, Township 29 s., Range 33 E., Mount diablo Base and Meridian is mor particularly described in Exhibit "A", consisting of four (4) pages and which is attached hereto and incorporated herein by reference as if fully set forth herein.

Let judgment be entered accordingly.

Dated: Aug. 16, 1989.

_____

John M. Nairn
Judge of the Superior Court

BOOK 6277 PAGE 1820

PLAINTIFFS
EXHIBIT
2

EXHIBIT "A"

A 30.00 FOOT EASEMENT FOR INGRESS AND EGRESS AND UTILITY PURPOSES OVER, UNDER AND ACROSS THE SOUTH HALF OF THE SOUTH HALF OF SECTION 11,T.29.,R.33 E.,MOUNT DIABLO BASE AND MERIDIAN, THE CENTERLINE OF SAID EASEMENT TO BE 15.00 FEET ON EACH SIDE OF THE FOLLOWING DESCRIBED CENTERLINE: COMMENCING AT THE SOUTHWEST CORNER OF THE WEST HALF OF THE NORTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SAID SECTION 11; THENCE SOUTH 89 DEGREES 58 MINUTES 22 SECONDS WEST 506.66 FEET ALONG THE NORTH LINE OF THE SOUTH HALF OF SAID SOUTHEAST QUARTER TO THE POINT OF BEGINNING OF THE AFOREMENTIONED CENTERLINE;THENCE -------

---

----- 40 MINUTES 30 SECONDS;THENCE NORTH

(emphasis added) BOOK 1069 PAGE 439

84 DEGREES 14 MINUTES 48 SECONDS WEST 5.75 FEET----------THROUGH A CENTRAL ANGLE OF 12 DEGREES 56 MINUTES 20 SECONDS;THENCE SOUTH 52 DEGREES 43

MINUTES 07 SECONDS----------
WEST 29.00 FEET, MORE OR LESS, TO A POINT OF IMTERSECTION WITH THE WEST LINE OF THE SOUTH HALF OF THE SOUTHEAST QUARTER OF ----------. SAID POINT OF INTERSECTION BEING THE TERMINUS OF THIS DESCRIPTION. AFORESAID SIDELINES TO BE SHORTENED OR LENTHENED SO AS TO BEGIN ON THE NORTH LINE AND TERMINATE ON THE WEST LINE OF THE SOUTH HALF OF THE SOUTHEAST QUARTER-----.

COPY OF BROWN'S PLATTING

FILED Aug. 3, 1977

MANNING, REYNOLDS & ROBERTS
A Law Corporation
1900 Avenue of the Stars
Suite 2840
Century City
Los Angeles, California 90067
(213)277-4796 and 879-3042

Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF KERN

JOSEPH B. VAN ORDEN, CHARLES W. MC GOWAN III, JAY VAN ORDEN, KENT AND PATRICIA WARDELL, STOYE AND ANNA MILBURN, and ALFRED O., BETTY JANE and RUSSELL J. KNAPP, Plaintiffs, -vs- PAT RABIDA and DOES 1 through	148546 COMPLAINT: (1)FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTION, AND FOR DAMAGES FOR NUISANCE; (2)TO QUIET TITLE TO EASEMENT AND FOR DAMAGES; (3)FOR EASEMENT BY NECESSITY; OR IN THE ALTERNATIVE,

APPENDIX K

20, inclusive)(4)FOR EASEMENT BY
)
Defendants.) IMPLIED RESERVATION

FIRST CAUSE OF ACTION

(For Permanent Injunction

and for Damages for Nuisance

---

9. That at all times relevant hereto, each defendant was the agent and/or employee of each and all of the other defendants and was acting within the course and scope of said agency and/or employee, with the consent of their co-defendants.

10.--at all times---defendants---were members of and engaged in a Joint Venture or common enterprise.(emphasis added)

11.Plaintiff JODEPH B. VAN ORDEW is, and at all times herein mentioned was, the owner of the following described real property in Kern County, California, to wit: (E½ of NW¼ of SE¼) of Section 11---.)

12.Appurtenant to the parcel of land des-

cribed in paragraph "11"--is a right of way---approximately 10 feet in width throughout--over the Rose property. (emphasis added)

13. Plaintiff Mc GOWAN is, and at all times herein mentioned was, the owner of----(NW¼ of NW¼ of SE¼) of Section 11-----.

14. Same as "12" (substitute "13"for "11").

15. Plaintiff, JAY VAN ORDEN is, and at all times herein mentioned was,the owner of---(W½ of NE¼ of SE¼) of Section 11-------.

16. Same as "12" (substitute "15" for "11").

17. Plaintiffs, WARDELL are, and at all times herein mentioned were, the owners of ----(NE¼ of NE¼ of SE¼) of Section 11----.

18.Same as "12" (substitute "17" for "11").

19.Plaintiffs MILBURN are,--at all times herein mentioned were,the owners of------(SE¼ of NE¼ of SE¼) of Section 11-------.

20.Same as "12" (substitute "19" for "11").

21.Plaintiffs Knapp are, and at all times herein mentioned were, the owners of-----

(SW¼ of NW¼ of SE¼) of Section 11--------.

22.Same as "12" (sustitute "21" for "11").

23.Defendants are, and at all times------ owners of----real property---adjacent to the southerly line of the (N½ of SE¼) of Section 11---and suject to the above-mentioned and described right of way,to wit: (S½ of SE¼) of Section 11---------.

24.Said right of way extends from--land-- Bureau of Land Management, and affords a means of ingress and egress to and from plaintiffs' said properties.

25.During the year 1972, and on numerous times thereafter, defendant wrongfully obstructed, and continues to obstruct, said right of way by placing a locked gate across the road, blocking access to the northern eighty (80) acres, thereby making same impassible. Plaintiffs have heretofore demanded of defendants, and each of them, that they remove said obstruction, but defendants ---,refused, and continue

to refuse,to remove said obstruction, and threaten to, and will continue to, maintain same as a permanent obstruction to the use of the right of way unless restrained by judgment of this court. (emphasis added)

26.----plaintiffs' access---along said right of way are completely cut off-----.

SECOND CAUSE OF ACTION

(--Quiet Title----and for Damages)

27. Plaintiffs reallege----------.

28.----the southerly line of plaintiffs' property joining---defendant's property, forming a common boundary.

29.ROBERT C. and MARY ALICE MONROE (hereinafter "MONROE") and A. FLETCHER HARRIS (hereinafter "HARRIS") were the predecessors in interest to plaintiffs-------and defendants------. MONROE and HARRIS purchased and became the owners of the property presently owned by the other plaintiffs,---and defendants--to wit:Southeast

¼ of Section 11---on or about October 29, 1969 by deed from ---MCCARTHY,who at said time were the owners of all the within described property, which was one contiguous parcel of land.

30.---June 15, 1970, defendants,----became owners--- by deed from--MONROE and HARRIS.

31.Prior to conveyance of said parcels of land to plaintiffs,--and defendants---and since 1969, the then owner of the (N½ of SE¼) of Section 11-----said MONROE and HARRIS created an easement over a portion of (S½ of SE¼)---now owned by defendants, ---by constructing a road over said parcel, which road has been in continuous use by plaintiffs, and each of them, and by plaintiffs' predecessor in title, (except when periodically obstructed by defendants, and each of them), and visibly present since construction. Said easement is necessary for plaintiffs------- (emphasis added)

32.Plaintiffs---are the owners of said

easement--------and are entitled to pass freely through and on defendants' parcel ---to make use of said easement.

33.Defendants ---claim an interest in all of said parcel-----claim a right to use and occupy all of said parcel and to deny plaintiffs---the right to any use thereof or interest therein.

34.--claim of defendants--is without any basis in law or in fact, and defendants--have not acquired any estate, right, title or interest whatever in and to the easement belonging to plaintiffs--------.

35.Defendants, and each of them, did, during the year 1972 and on numerous times thereafter, wrongfully and unlawfully enter on and withhold possession of said easement from plaintiffs, and each of them, and did construct a locked gate across said easement, and defendants, and each of them, are now unlawfully, wrongfully, and forcibly withholding possession of said

property and premises from plaintiffs,and each of them, to their wrong, damage and injury in the sum of Ten Thousand Dollars ($10,000)each.

FOURTH CAUSE OF ACTION

(For Easement by Implied Reservation)

40.----------

41. Prior to conveyance of said lots to plaintiffs, and each of them, and defendants, and each of them, MONROE and HARRIS had created a quasi-easement over an unimproved road which passed over the ROSE (defendant) property and provided access to the plaintiffs' property. Said unimproved road had also been utilized by the predecessors in title to MONROE and HARRIS and was so obvious as to show that said use was intended to be permanent.

NOTE: The Complaint was signed by attorney for Plaintiffs, Harry M. Reynolds and it was verified by Joseph B. Van Orden.

WILLIAM A. KERR,ESQUIRE
JAMISON,NOBLE & HULSE
100 Wilshire Blvd. Suite 710
Santa Monica California
90401
(213) 451-8947

FILED
'78 APR 27

Attorney for Cross Complainant

Superior Court of the County of Kern

Kern County Civic Center-

1415 Truxton Avenue

Bakersfield California 93301

Cross-Complainant: PATRICIA S. ROSE,et al.

Cross-Defendant: ROBERT C. MONROE et al.

REQUEST TO ENTER DEFAULT Case No.:148 546

1. TO THE CLERK Please enter the default of the following defendant on the cross.. complaint. Defendant STOYE MILBURN

Enter default only ENTERED 10

Dated:April 24, 1978 WILLIAM A KERR

Signature of Attorney for Plaintiff

DECLARATION UNDER CCP 585.5

This action is not on a contract or installment sale for goods or services subject to CCP 1801, etc(Unruh Act)----

is not a conditional sales contract subject to CC 2981 etc.(Rees-Levering------) is not on a obligation for goods, sevices, loans or extension of credit subject to CCP 395(b)

I certify under penalty of perjury that the foregoing is true and correct and that this declaration is executed on April 24, 1978 at Santa Monica, California.

WILLIAM A. KERR _____
Signature of declarant

PALMER & PALMER
Lawyers
1412 17th Street
P.O. Box 2206
Bakersfield California,
93303
(808) 323-6277

FILED 80 JUN 16

Entered 58

Attorneys for Cross-complainant, ROSE

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF KERN

1415 Truxton Ave.Bakersfield Cal. 93301

Plaintiffs:

JOSEPH B. VAN ORDEN

Defendant:

PAT ROSE

CASE NUMBER

148546

REQUEST FOR

DISMISSAL

With prejudice.

AS TO CROSS-DEFENDANTS

ROBERT C. MONROE AND

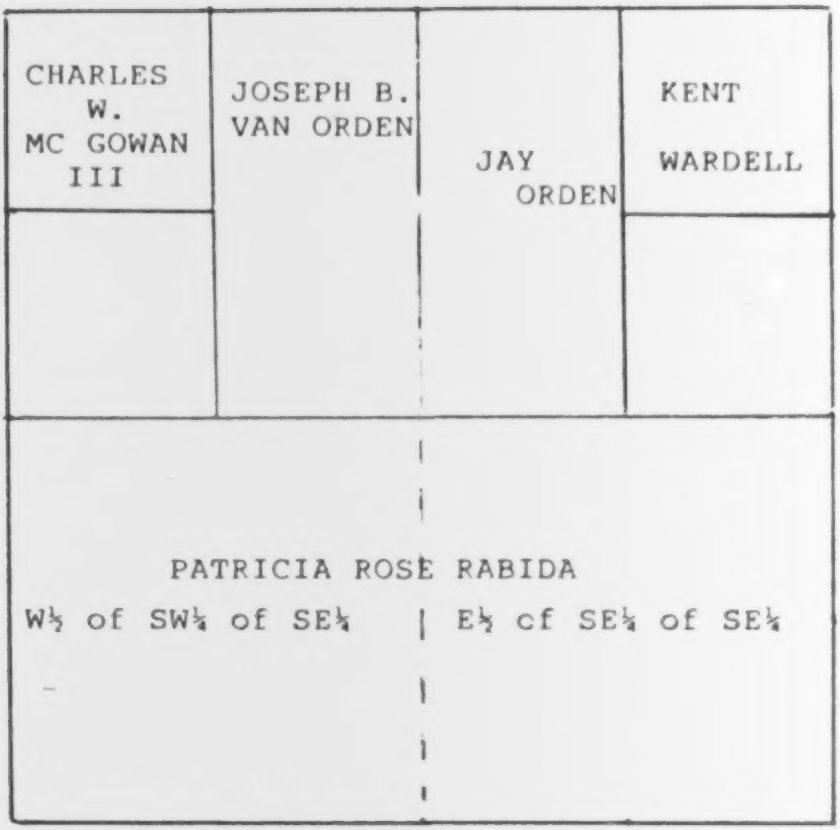
MARY ALICE MONROE ONLY

Dated: June 12, 1980

By: _____

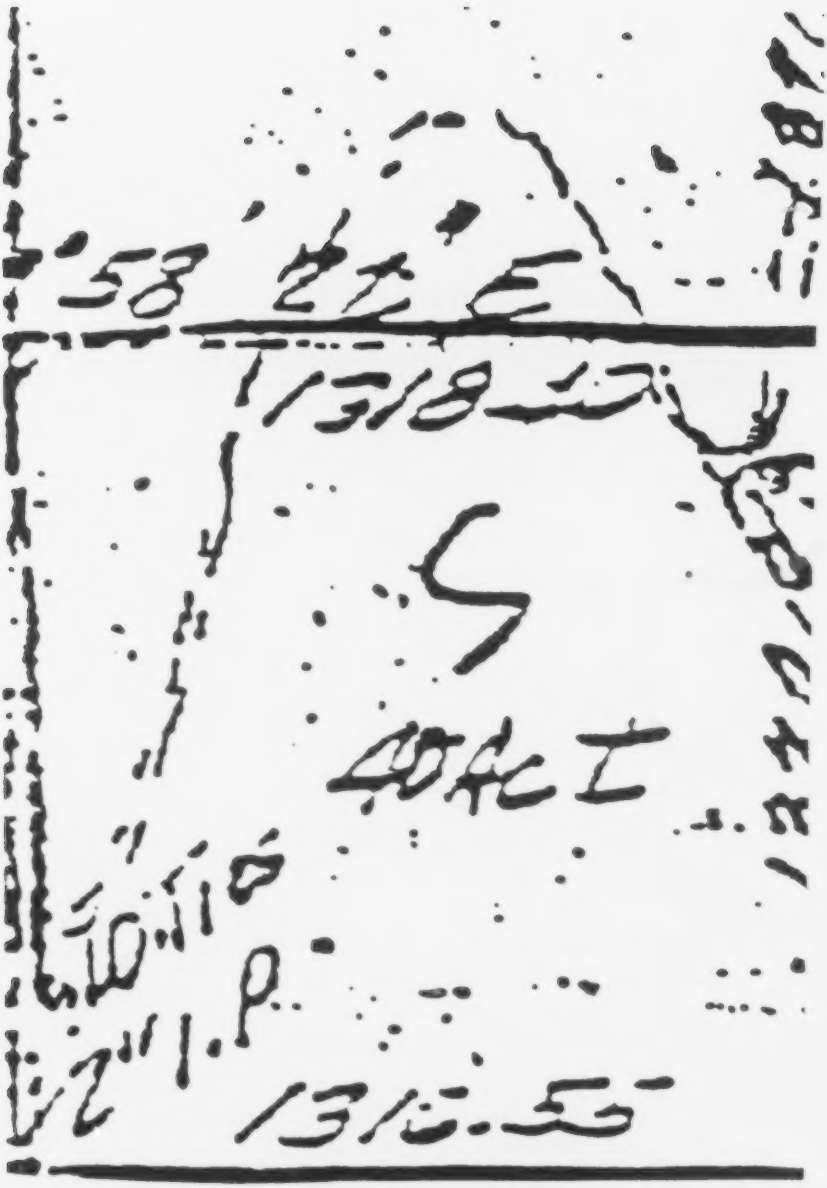
Attorney for Cross-Complainant, ROSE

WILLIAM D. PALMER



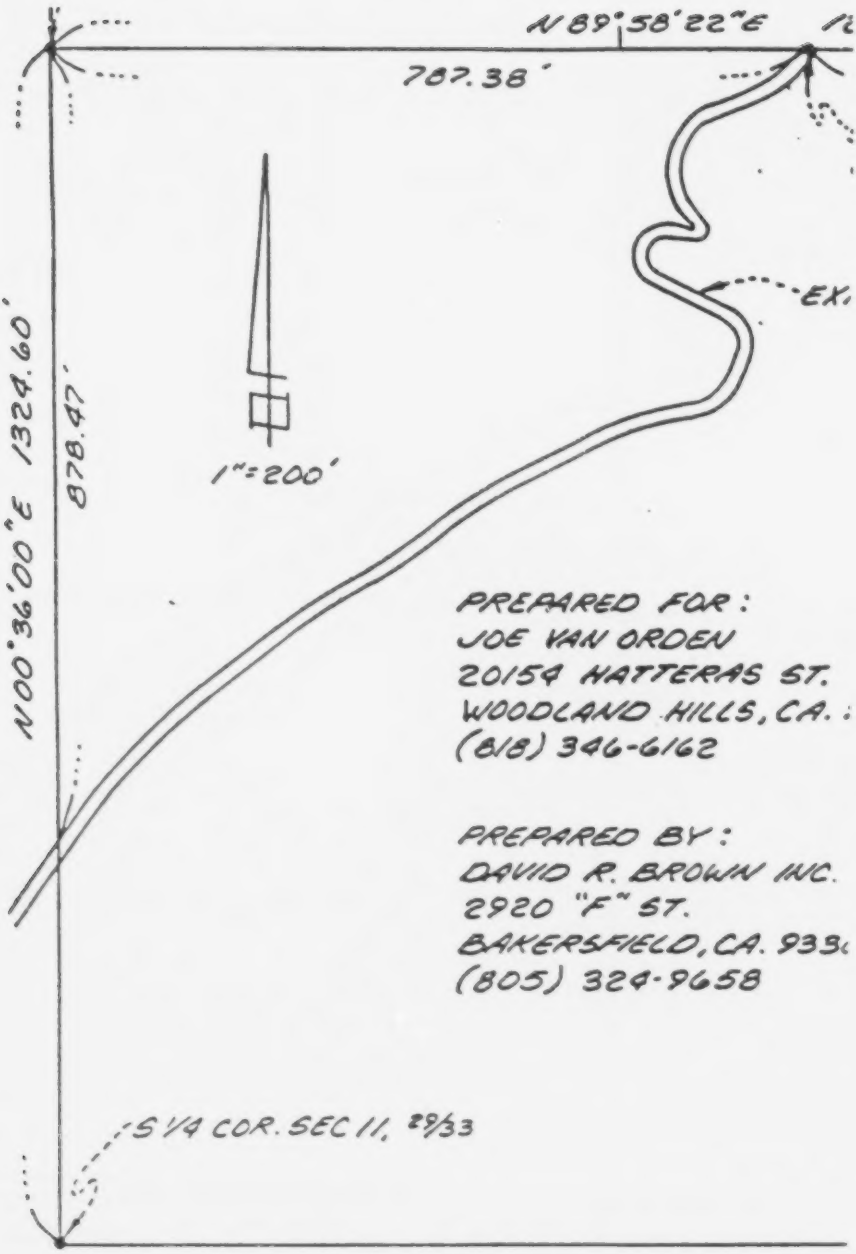
SE¼ of Section 11 showing owners as described in Complaint

APPENDIX N



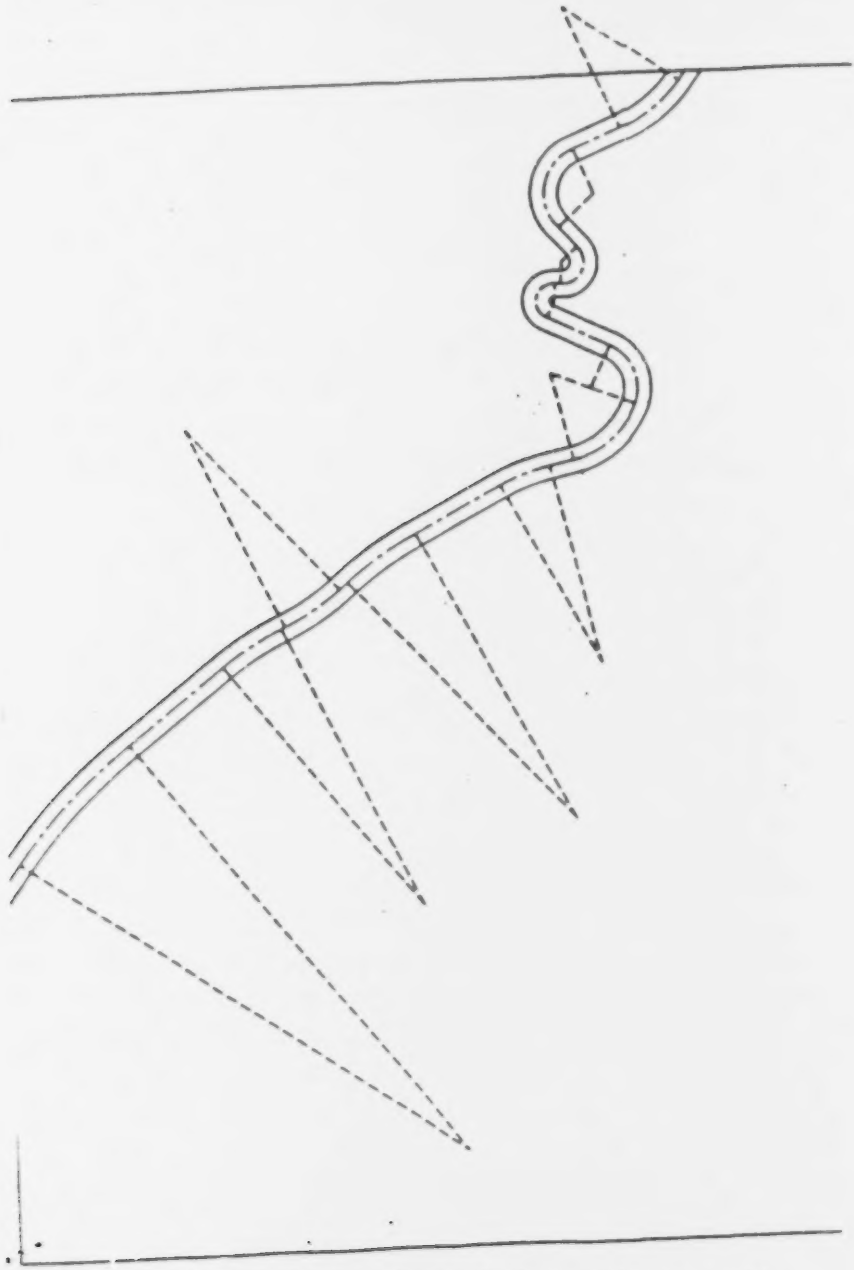
Bell-Shaped-Curve Road Depicted on the
May 1970 Work Map by Alan Whitlock

APPENDIX O



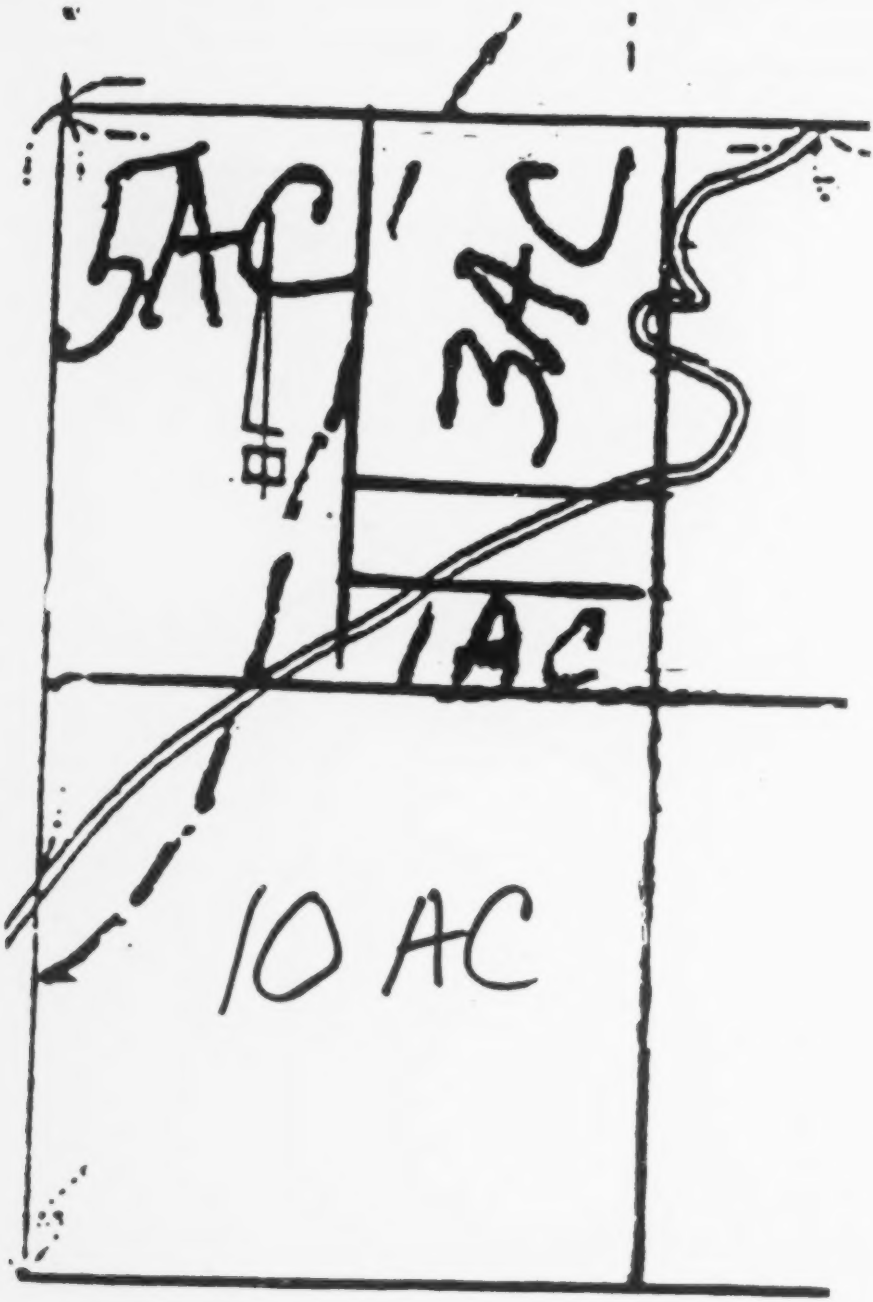
Diagonal Road in SW¼ of SE¼ as Depicted on David Brown's Aug. 4, 1989 Platting

APPENDIX P



Diagonal Road Depicted in SW¼ of SE¼
Depicted on Don Ward's Map based on
Brown's Easement Description

APPENDIX Q

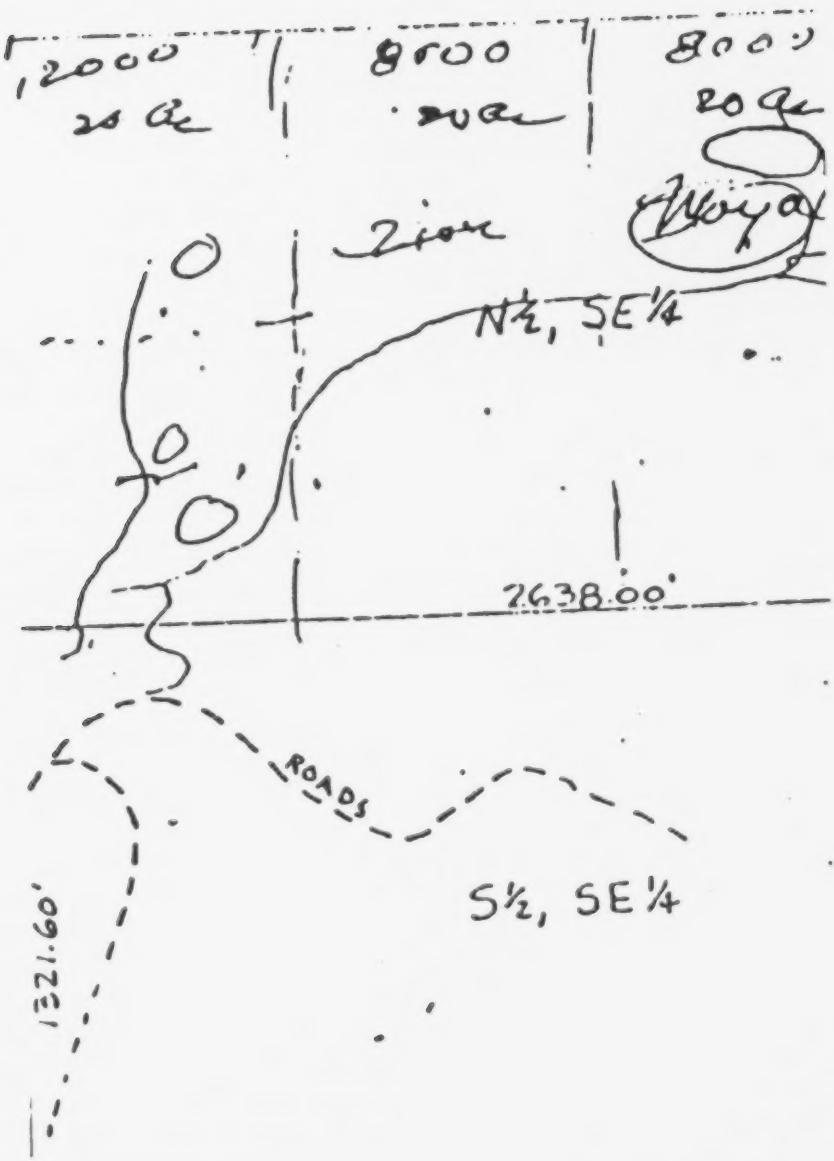


Overlay of Bell-Shaped-Curve Road
and Brown's Diagonal Road
In Response to Inference of 1991 Opinion

APPENDIX R

Tracing of Roads in W½ of SW¼ of SE¼
In 1975 Aerial Photograph

APPENDIX S



W-E Road depicted on the August 1970 Whitlock Map with Van Orden's illustration of extention thereto.

APPENDIX T

APPENDIX
STATUES, CONSTITUTIONAL PROVISIONS,
CODES, ETC. INVOLVED IN CASE

28 Cal.Jur.3d P 53, 3 By Implication (7): "In order for the court to enforce the implied grant of an easement, the following conditions must exist:.
(1) Separation of Title.
(2) Before the separation takes place, the use giving rise to the easement must have been so long continued and so obvious as to show that it was intended to be permanent, and
(3) The easement must be reasonably necessary to the beneficial use of the land granted.
(See also 3 Witkin Summary of Cal. Law (8th Ed. 1973)Real Property #355 p. 2052).

In order for an easement to arise by implication, it must be both apparent and continuous or obvious and permanent. (C.C.Sec. 1104)....but if it is not apparent and continuous, it is not included in the conveyance unless the grantor uses language in his deed sufficient to create an easement de novo." (19 Cor. Jur. 917) in (Kytasty v Godwin (1980) 162 Cal Rptr. 561 (4-5);102 Cal.App.3d 727).

Orr v Kirk(1950) 100 Cal. App.2d 678,681, 224 P2d 71 (4);"Whether an easement arises by implication on a conveyance of real estate depends on the intent of the parties, which must clearly appear in order to sustain an easement by implication, In order to determine the intent, the court will take into consideration the circumstances attending the transaction, the particular situation of the parties, and the state of the thing granted. (28 C.J.S. 686 #30) The purpose of the doctrine of implied

easements is to give effect the the actual intent of the parties as shown by all the facts and circumstances, The effect of Section 806 of Civil Code is to establish intent as criterion and this is in accord with the rationale of the rules governing easements by implication...Among these circumstances is the use which is being made of the dominant tenement at that time. As stated by the Supreme Court:"The purpose of the doctrine of implied easements is to give effect to the actual intent of the parties as shown by all the facts and circumstances."(Fristoe v Drapeau 35, Cal.2d 5, 8, 215 P2d 729)

"Since an easement by implication takes real property or an interest therein from the record owner and vests it in another, certain conditions must exist at the time of the conveyance from the common title before courts will enforce the implied grant.(Navarro v Pulley 66 CA 2d 827,153 P2d 397; Piazza v Schafer 255,CA2d 328, 63 Cal. Rptr. 246)
These conditions are:

(1) Separation of Title.(County of L.A. v Bartlett 203, CA2d 523, 21 Cal. Rptr 776; Piazza v Schafer (Id)
(2) Before the separation takes place the use giving rise to the easement must have been so long continued and so obvious as to show that it was intended to be permanent."(Navarro v Pulley 66 CA2d 827, 153 P2d 397)

"The extent of an easement created by implication is to be inferred from the circumstances that existed at the time of the conveyance and gave rise to the implication. Among these circumstances is the use being made of the dominant tenement at the time." (Wilson v Abrams 1 CA3d 1030, 82 Cal.Rptr. 272; Gagnon v Adamson 122 CA2d 678, 224 P2d 71) (See also; (Orr v Kirk(Id.) 71-73)

"Where the easement is acquired by implied grant, the scope of the easement is measured by the extent the property was obviously and permanently used at the time when the transfer was completed." (Kytasty v Godwin (1980) 102 Cal.App.3d 72;162 Cal.Rptr.561-563)

"Nevertheless, the concern of the court in any case is not to increase the burden as it respects the servient tenant." (Joseph v Ager, 108 Cal.517. 520-521,41 P 422; Crimmins v Gould 149 Cal.App.2d 383, 390-392, 308 P2d 786).-----"The evidence does not support a finding the easement used or reasonably expected for future use of the dominant tenement was 60 feet wide. Except to the extent of the language contained in the three trust deeds given by Land Co. there is no evidence of expected future development when Land Co. conveyed to Mathews.--Any knowledge on Mathew's part of the easement's terms in the trust deeds was not established.---Moreover, there is no evidence Mathews otherwise knew at the time of purchase the location of the easement described in the deed of trust or it's width when he acquired the 160 acres.(Kytasty v Godwin (1980)162 Cal.Rptr,562-563)

"Once fixed, the scope of the easement cannot be changed without the consent of the servient owner. The rationale for these restrictive and long relied on rules of property law is explained in Felsenthal v. Warring 40 Cal.App. 119, 131, 180 P 67; 'We know of no principal of law or power in the court of equity to justify or authorize an invasion of the property rights of one private party to serve the convenience of another private party. such a principal, if once adopted by judicial tribunals upon grounds of neccessity,

would, in it's practical operation, result in condemnation of the property of one citizen, to answer an assumed neccessity of another citizen, and the sacred right to property, so jealously guarded by the courts of english speaking countries,would become but a shadowy unsubstantiallity." (Tarr v Watkins 4 Cal. Rptr. 203)

Kreiger v Pacific Gas,(1981)119,Cal.App3d 145,755-756:"The guniting of earthen ditch enlarges the easement by alteration in the mode of operation and is not merely a repair 'the word repair in it's ordinary sense relates to the preservation of the property in it's original condition. and does not carry the connotation that a new thing should be made or a distinct entity created.'" Whalen v Ruiz (1953) 40 Cal.2d. 294,300,253, P2d 457; 'The easement owner may make repairs, improvements, or changes which does not effect the substance ' (Burris v People's Ditch Co. (1894) 104 Cal. 248, 252, 137 P 22; Brown v Radcliff (1913) 21,Cal.App. 282, 131 P 769; White v Walsh (1951) 105 Cal.App.2d,828,234,P2d 276) Here the repair affects the substance of the easement."
"This character and method of use fixed the extent of the servitude on Krieger's property under the law. Once fixed, the scope of the easement cannot be changed without consent of the servient tenant."

"The rights of any person having an easement in the land of another are measured by the purpose and character of that easement, and the right to the use of the underlying land remains in the fee owner insofar as it is consistent with the purpose and character of the easement. Moreover, the fee-owner may transfer to another the right to use that which he has retained and could exercise himself." (Guerra &

Packard 236,CA2d 272, 46 Cal.Rptr.25, 99.8: Langazo v San Joaquin Light and Power Co. 32 CA2d,678, 90 P2d 825; L.A. v. Howard 244 CA2d 538, 53 Cal.Rptr. 274)

Clean hands:"Burden is upon a complainant in equity to prove that,as far as transaction involved in his demands is concerned, he is free from vice, and equity interposes a barrier against such litigant making an inequitable demand for the sake of the law itself, and upon ascertaining the fraudulant nature of the original transaction, will deny relief to demand stemming from the original tainted arrangement." (Morrison v Wilhoit (1944) 145, P2d 707, 62 CA2d 830)

CCP 367: 1. Purpose: "Requirement that every action be prosecuted in the name of real party in interest, is designed to protect defendant from multipicity of suits and from further annoyance and vexation and to fix and determine the real liability in alleged complaint."(Space Properties Inc. v Tool Research Co.(1962) 22 Cal. Rptr.166, 203 CA2d 819; Kodota Fig. Assn.of Prod. v Case-Swaune Co. (1946) 167 P2d 518, 73 CA2d 796; Kittner v. Shippy (1908) 96,P912m 8 CA 342)

"Where tresspass has been committed from wanton or malicious motives, or reckless disregard of the rights of others , or under circumstances of great hardship or oppression, it is clear that punitive damages may be rewarded." (Haun v Hyman (1963) 223 Cal.App.2d 620, 36 Cal,Rptr. 84) Causes of action for conversion and tresspass support an award of exemplary damages. (Cyrus v Haverson (1976) 65 Cal. App.3d 306, 316, 135 Cal.Rptr.)See also Samuelson v Ingram (1969) 272 CA2d 804-806.

CCP 133:Deceiving a witness:"Every person who practices an fraud or deceit, or knowingly makes or exhibits a false statement, re presentation, token or writting, to any person about to be called as a witness upon any trial, proceeding, inquiry, or investigation whatsoever, authorized by law, with the intent to affect the testimony of such witness, is guilty of a misdemeanor." Enacted 1872.

"Thus an action is filed in time when the complaint is filed within three years after date which the complaint alleges marked the obstruction of the right of way. (Roth v Cottrell 112 CA2d 621, 246 P2d 958. (1952)):
Id (1)"...appellants are..relying..upon obstruction and hinderance in the use of an easement which gives access to their property."
Id (7(a)"The first complaint was filed within three years after date which the complaint alleges marked the obstruction of the right of way which obstruction is the graveman of appellants' action. When this occurred the cause of action arose. The case is governed by CCP 338(2) which applies to injury to real property."
Id.(7(b) "We think it clear that the case is governed by the three year limitation set forth in CCP Section 338(2) and since the action was filed within three years of the alleged tortuous invasion of the plaintiff's rights, the action is filed in time.
Id(8) "The word 'injury' generally means in law, invasion or violation of a legally protected interest or property right of another."(Luellen v City of Aberdeen 20 Wn2d 594, 148 P2d 819, 855) citing Words and Phrases Perm.Ed. 437; Ballentine Law Dictionary 650-652)

Weightman v Hadley (1956) 138, CA2d 831, 292 P2d 909:(2)"Remititur Effect of Decision of Appeal as Law of the Case- On retrial after decision by an Appellate Court, the decision of that court becomes Law of the Case on facts then presented."
In this case,J. Valley Hadley held:"(9) "The Law of the Case consists in the propositions of law actually decided and applicable to the facts in judgment. It only applies when, upon subsequent trial, the issues and facts found remain substantially the same, and has no application where the facts alleged and found are materially different from those considered on the former appeal. (Height v Minor 113 Cal. 385, 391, 45 P 700)

In Vagel v Vagel 45 C2d 804; 291 P2d 25, J.Edmonds held: "Those who deny recovery generally proceed upon the theory simi lar to unclean hands principle; most of the decisions which allow recovery are based on the principle that one who seeks equity must do equity.---(5) The doctrine of the Law of the Case is recognized as a harsh one ...the modern view is that it should not be adhered to when the application of it results in a manifestly unjust decision. (England v Hospital of Good Samaritan,14 Cal.2d 791, 795, 97 P2d 813)" Repeated in Wicktor v County of L.A. 177 CA2d 390; 2 Cal. Rptr. 352. adding:"It is firmly established that the Doctrine of the Law of the Case does not apply to a second trial which presents facts substantially different from the first."

"Under substantial evidence rule, Appellate Court as required to review whole record in light most favorable to judgment below to determine whether it discloses substantial evidence that is; evidence that is reasonable, credible, and of

solid value, such that some reasonable trier of fact could find that the judgment and every essential element thereof was established by appropriate burden of proof." (Rivaid v. Board of Pension Coms. (1985) 164, Cal. App. 3d 405,414, 210 Cal. Rptr. 509)

Haas v. Central Union H.S.Dist. 27 Cal. App.2d 319, 322 (80 P2d 1044);"There is however, a settled limitation upon the doctrine which must be taken into account, this qualification is that when an ajudication is made upon certain state of facts there must be substantial identity of facts on subsequent appeal in order that the doctrine shall be applicable."

"Appellate Court as permitted to allow Appellant to assert new theory of case on Appeal if facts were clearly put at issue at trial and are undisputed on Appeal; but if new theory contemplates factual situation whose consequences are open to controversy and were not put at issue or presented at trial, opposing party should not be required to defend against it on Appeal." (Richmond v Dart Industries Inc, (1987) 196 Cal.App.3d 869, 879, 242, Cal. Rptr. 184)"

OBJECTIONS MADE AND REVIEW SOUGHT IN

COURT OF FIRST INSTANCE:

The court of the first instance was the Superior Court Civil Division, Bakersfield California; The Reviewing Courts were: Fifth District Court of Appeal, Fresno California; Supreme Court, San Francisco California.

Re: Statutes of Limitations:

Symonds:"--We also have a problem about if it was May of 1970 that she put this gate across, the Statutes of Limitations have been blown into 318, 319, and 320 CCP ---You said then that it was just a temporary stoppage, and again, there's no evidence."

Court (Hon John M. Stanton):"Well, I think ----I concluded at the time that the statute had probably run and then I concluded it really hadn't,and it's in the record, It's there in the file, my reasons for it." (Oct. 6, 1981,Court Reporter's Transcript

of Hearing on Findings (Herein "FH")
26,6-20)

Symonds:"--As to Page 4, this belies their total Complaint. In their entire case from day one, Aug. 3, 1977, when this matter was filed, the whole graveman of the complaint is we are being prevented access from our land blah, blah, blah. And now they were never prevented access--.

Court:"Counsel, read it."

Symonds:"All right.'Subsequent to May of 1970, Defendant Rose has placed a locked gate across the access road. The locks have always been broken and the gate has not prevented the owners of the upper portion of the SE Quarter from gaining access to their property.'"

Court:"When they have to break somebody's locks or get a pair of bolt cutters over there---Are you telling me that (defen dant is letting him go across the property now ?"

Symonds:"No, she never. Now they're saying they never had any problems with access."
Manning:"We treated it as an easement."
Court:"You want to treat it as an easement across there, counsel that they don't have any problem getting across there.There's no problem, I think what happened is that in order to gain access to their property, the plaintiffs, the Van Ordens, had to use a pair of bolt cutters to get up to their property, and they did. They did not accept the chain. I think that's what it means, If it's inaticulately drawn, then perhaps Mr. Manning better-----".
Symonds:"No, it's not inarticulately drawn. How does that---"
Court:"I don't think there is any problem with that. The fact of the matter is that they have claimed access all along. They have tried to use their access when they wanted to get up there, And in order to maintain their access,it appears that

they've used bolt cutters or something to get through." (RH:24,33-26,5)

Re: Affirmative Defences (Statues of Limitations); Second Cause of Action, Laches, & Easement by Prescription:

Symonds:"We also request under CCP 634, Rule of Court 332,Subdivision D further findings as to certain arguments.

In our Proposed Findings of Fact and Conclusions of

Law. "We find that they omitted in total their Second Cause of Action,--is for Quiet Title. As stated in Auer v. Frank, that's automatic reversal.In addition, no finding on the Cross-Complaint. There's no Findings on Affirmative Defences . Again, these are grounds for automatice reversal."

Court:"That means they don't exist."

Symonds:"You have to make a finding of that."

Court: "Put it in."

Symonds:"I've already put it in. Our Findings are obviously opposite to this court.

We found that the Statutes of Limitations have been breached. We find that laches did apply. say that she has an easement by prescription against this property, None of this has been found."

Court:"Mr. Manning, I'm ordering you to prepare findings for this Court and include the neccessary findings as Second cause of Action and the Cross-Complaint--And affirmative Defenses,-- I don't think, with what you tell me that the court has any choice but to order---appropriate Findings." (RH:38,12-40,10)

Re: A North-South Road constructed by tresspass and the element of prior use.

Symonds:" The second element that must be satisfied---the easement has to be so long. In other words, there had to be something on the land, something to give them notice. It gets back to our central argument, Ex. J shows no N-S road ---None. Zero.Zip.-- and the other photos, Ex H and I, which

show the state of the property just before July 2nd,nothing. In order for them to prevail on this element, they have to be able to prove that when she went to the property, there was the trails or the road there. There's no evidence of that.
In addition, and this is where the Court is wrong on the law in the Day v, Robinson case, 131 Cal. App2d 622 which you cited, you said that they took subject to the map.
Court:"Uh-huh, they did."
Symonds:"They did not--because the Day Case gives the law that has to be satisfied on that. this concept of reference to a map, which is cited at Day pg. 624 --cites-- Danielson v. Sykes.".
Court:"Yes, I read that."
Symonds:"157 Cal. 686 Danielson v Sykes says in order for the doctrine to apply , you have to have the map mentioned by reference in the grant deed. There is no mention of any map in grant deed EX. O, EX.

M or N. Therefore doctrine cannot apply.
Court:"---the cold hard fact of the matter is that Mr Monroe was subdividing that land along with Russ Milburn---they were doing it without benefit of going through the county in order to file a subdivision map ---they were selling that stuff by map-- these people sold that property by reason of map.She knew the road was there. she knew the map was there. She knew the reason was going across the property in accordance with the map. She knew it was there, Along comes Van Orden, a year or two later, and he gets sucked up in this too.
He buys the same property by the same map showing that road across the property.
This man has every right to expect at that point that there's going to be a road across that profrom the bottom clear up to the top. That's just exactly what I did."
Symonds:"Except one small fact. The road was built by tresspass pure and simple."

Court:"I don't care how the road was built or not really. The problem is there's a road going across that map, and every-body bought by it, This is an illegal subdivision and you all know it.-----"

(RH;28,27-30,28)

Re.: Intent of the Parties.

Symonds:"---objection to proposed Conclusion of Law # 1---There was the intent of the parties. She testified that she did not want it. In fact the road was never built, the N-S road was never built until she was the subject owner.-----"

Court:"---a lot of times you're getting subdivisions when the roads aren't built until afterwards.

Symonds:"Again,your Honor, I ask,on July 2nd, why this road did not show up ?"

Court:"This has always been it, None of them used the property more than once or twice, maybe three to four times a year, The Van Orden's probably don't use it much

a year. There are times when you can't get up there. There are times when the whole roadway is going to be washed out because of flash floods. That's rugged country. The whole bunch of them could own the same

Symonds:"-- You find there is no problem with the mutual intent then ? Everyone intended this property to be subject to a dominant servitude ?"

Court:"Yes, yes. She bought the property according to the map. She knew there was a road across there, what other logical conclusion is there ? The road---that map existed two years later--in the same form that it did to begin with,"

Symonds:"I looked up every case cited in the Robinson Case, the one I just cited. and in every situation without any exception there was something on the ground, Now her testimony was that there was naked, vacant land. That's supported by the photographs.

The map itself, had no reference to the Grant Deeds. Therefore that doctrine does not apply----you can have an easement without prior use but that goes back to an old case--Prescott v. Edwards, 117 Cal. 302. In that case there was no map. The guy who subdivided put stakes in the ground--and everybody saw the stakes and thought the stakes represented streets--There was no prior use,but there was something in the , ground. Here there is nothing in the ground. ----the map doesn't even show the road was ---built,and she's under obligation to accept that even though she didn't ?"

Court:"--Obviously, they subdivided the property, they meant to sell the upper 80, They meant for some people to get over it some way or other. Obviously Mr Van Orden is not going to buy landlocked property. Obviously the Roses are not logically going to believe that the upper 80 is going to sit there forever landlocked. You know

the thing just doesn't make sense that way. The only thing that makes sense is that they all bought by the same map. they all knew the map was there, They all knew the road was either in or being put in and was all on the map. And we all know that sometimes maps and what actually goes in---I've been in the business too long--don't really match up closely. The fact of the matter is -----I don't know how many times a year they use it, but I have an idea it isn't too much. The Van Ordens don't probably use it too much more, or their grantees or whatever you're looking at, I think that under the circumstances the decision I made was the only one that made any sense." (RH; 33,17-35,14)

Symonds: "--Page 4 of plaintiffs' findings: 'Plaintiff are entitled to go up on the property of Defendant--for the purpose of maintaining a right-of-way and making it usable---The easement shall follow the

road drawn on the Whitlock Map...'

Your Honor, as EX. E, taken in July 1975 shows, this easement, which was built by tresspass in Oct. 1970; it doesn't even remotely follow in the slightest the---'Whitlock Map.'"

Court:"Then they ought to go by where the road was actually built."

Symonds:"But the road doesn't even reflect the map. she's ordered to have a road on her land built according to Whitlock Map. So now what you're saying is they can come with their bulldozer any fine day after this judgment becomes final, to redo this road to fit the Whitlock Map. Is that what you are saying ?"

Court:"Yes, I think it's silly, but I think the parties ought to get together and find a way across it.

Symonds:"Again I say you have no jurisdiction. They ask for on thing and you give them another."

Court:"I think the court has jurisdiction to do it." (RH;37,1-38,11)

Symonds:"If the roads were there in the winter of 1970---some evidence would have to appear in Ex.J. --it is not there.

Court:"I think that it is quite plain that they all bought off the same map. They all use the property maybe once or twice a year. They could all use the property for twenty years and never see each other,--the Van Ordens--shouldn't be done out of their investment. There again, probably the same, (defendant) shouldn't be done out of it."

Symonds:"That, unfortuantely from her standpoint doesn't square with the law, she doesn't have to go along with it."

Court:"It squares with the law that I believe applies to the case under the circumstances." (RH; 32,26-33,16)

Re.:(Intent) Grantor Monroe's Dec. 1975 letter to Joseph B. Van Orden.

Van Orden:"When I found the attitude of

the (defendant)--in '73 I felt--we all had a problem--so I did visit Monroe--"

Roberts:"Did you discuss with Monroe an easement over the lower eighty to reach the upper eighty?" Answer: "Yes."

Symonds:"I---object to that as calling for hearsay,Your Honor."

Court:"Read the question."-----"Go ahead."

Roberts"Your honor,we offer this as Plaintiffs three in evidence."

Symonds:"I object on the grounds of hearsay, this is an out of court statement not under oath being offered for the truth asserted, the contents. The maker is not here, Mr Monroe is not an adverse party,again,to the plaintiffs. He is not present. There is no exception to the hearsay rule---that allows this doctrine in, and on those grounds I object most strenuously."

Roberts:"----This particular letter is an admission directly on the point---that are raised in this issue in this particular

law suit and would be an admission against the interest of a party."

Symonds:"Your honor, a declaration against interest, it requires the unavailability of the declarant, number one. It must be against his distinct pecuniary civil-criminal interest in order to come under 1230 exception for declarations of interest, This is not what it is, This is simply a hearsay statement."

Court:"All right. Okay. If you all want to do it, there's no question he can get a hold of Monroe."

Symonds:"Fine. Let him bring Monroe in ."

Court:"There's no problem."

Symonds:"Fine. WE ASK THAT MONROE BE BROUGHT IN. Even if Monroe is brought in, there's still some questions as to hearsay. This is an out of court statement, He is not under oath. It is being offered for the truth.--"

Court:"Well, it would appear to the court,

that Monroe and his engineers were the ones that created this problem to begin with in the sense that that map over there shows a dotted line which we all understand to be a road across (defendant's) property up to the upper eighty and back down into the other forty on (defendant's) property. It would appear to the court that to the extent that that is--and (defendant) has to admit she saw that map in the beginning with those marks on it indicating the road --and--"

Symonds:"The Cause of Action for Implication, my understanding is based on the Intent of the Parties. This document goes right to one of the elements that the Plaintiffs must prove and they are trying to prove it through a hearsay document that I cannot cross-examine.

Court:"--This's one of the things I was going to take up. An easement by implication arises under the following circum-

stances. there must have been a separation of title------before the separation takes place the use giving rise to the easement must have been so long continued and so abvious as to show it was intended to be permanent----- That's the law on the subject, gentlemen."

Symonds:"My understanding is that the intent of the parties ---is one of the key factors also.What the intent of the parties was."

Court:"It's an implied intent.---it says implication. I will read that thing again. Before the separation takes place the use must have been so long continued and so obvious so as to show it was intended to be permanent. The parties do not have to discuss it. It has to be there, It has to have been used. and has to have been taken care of.---that's the second factor-----"

Symonds:"Well, if that's the case,this letter is irrelevant because it has nothing to do with the elements you just discussed and

has nothing to do with whether it was open and notorious--with separation of title---reasonably neccessary.

It's just a statement by him, so it is totally irrelevant in addition to the hearsay objection."

Roberts:"----but it certainly is relevant to the issue which no grantor can state what his intent was."

Court:"Reason by implication isn't done that way.------is done where you separate two parcels of land,---where the property has been used and will continue to be used,Now we haven't gotten very far on this.------."

Symonds:"But again, the letter does not talk about neccessity. basically he forgot to put it in the grant deed.--what has that have to do with the elements of these Causes of Action?"

Roberts:"Yes, it does talk about neccessity.---He says--he would have put it in the

grant deed is because it is the only way to get to the property and that goes to neccessity."

Symonds:"I can't cross-examine it,"

Court:"I don't think Mr. Monroe is an engineer."

Symonds:"It doesn't make any difference if he's an engineer if it is his opinion.--the plaintiffs are bootstrapping this opi nion to satisfy one of the elements of their Causes of Action."

Court:"----Easement by Implication is treated at the time the deed is granted or it isn't granted at all, right?"

Symonds:"Right."

Court:"So it is there at the time."

Symonds:"So what does the 1975 letter have to do with it?"

Roberts:"The letter has to do with neccessity and relative hard ship, which are the other issues in this case."

Court:"Bob Monroe is not an engineer."

Roberts:"Bob Monroe owns the property and --hired surveyors and--people to construct roads.--Monroe developed the property and ---sold the property---knows how to put the roads in---this particular letter is an exhibit to his deposition. He goes into great detail to explain what he did to determine where the roads could be placed on the property.

Court:"That doesn't create an easement by implication.

Roberts:"But it does by necessity. There's more than one theory."

Court:"You're running on two theories ?"

Roberts:"Yes."

Court:"Implication and Necessity ?"

Roberts:"Correct."

Court:"Okay. Maybe we can get somewhere with this thing. I hope so. An easement by implication is created at time of separation of title or it isn't created at all.

Roberts:"Correct."

Symonds:"All right."

Court:"It is created at time of separation of title because it was obvious from the lay of the land that that was meant by the parties. there was a road or a bypass road-way that had been used for a period of times. so obviously there that everyone knew or should have known at the time that that right of way was going to continue to be used. The third element is that it must be reasonably neccessary to the bene-ficial--use of the land granted.

Right now we are getting nowhere fast on either one of these elements, Separation of title,, there's no problem obviously."

Roberts:"Right."

Court:"The easement by neccessity---it arises by operation of law. It doesn't make a darn bit of difference what the intent of the parties are at the time that the claimed way furnishes the only way by which access may be obtained.----and then

there is an aberration of the whole thing. Donnell v Bissell Brothers. You know if you could keep the evidence down to those matters we could probably get out of here today. The rest of it is for the most part, irrelevant."

Symonds:"Well, That's why I say this letter, years after the grantor sells interest and says,'oh, by the way, I forgot and it's strictly necessary, I mean it's hearsay."

Court:"All right. The letter is out, I sustain the objection----"

Roberts:"On the basis of hearsay or irrelevancy ?"

Court:"I think it's irrelevant---We haven't gotten anywhere with had the property been used prior to the separation of title to (defendant) or whatever. You're wasting your time." (9-4-80 Court Reporter's Transcript (herein "CRT") 5,16-15,22)

Re.:Intent. Grantor's letter and Aug. 1970 Whitlock Map to defendant.

Symonds:"Now in your discussions with Mr. Monroe, did you ever receive a letter from Mr. Monroe regarding the roads that were to be on your property.

Defendant:"Yes, We did."

Roberts:"I will object to any discussion of Mr Monroe's letter as hearsay and irrelevant."

Symonds:"Your Honor, Mr. Monroe again, was the seller of the property way back through the various grantees to both parties in this action. One of the causes of action is that Mr Van Orden is seeking an easement by implication.----I have a very recent case which states implication depends on the intent of the parties.that's Kytasty v Godwin 102 Cal.App.3rd 762 at 769. It is a Feb. 1980 case.--It's an advanced sheet case,--presents easements by implication involve intent. I have CALJUR which basically confirms that is the state of mind of the ---original parties, how they

stepped into the shoes, has to be decided. We think that this letter and the other document that accompany it show what the intent of Mr. Monroe was."

Court:"What is the date on that letter ?"

Symonds:"Aug. 18, 1970. Mr Monroe was still the owner of the property that Mr. Van Orden is now the owner of."

Roberts:"---I don't disagree with counsel statement with respect to the law. I'm only talking about substantive issues. I'm talking about issues of evidence. I don't have any objection to the deposition of Mr. Monroe, which was taken in connection with this lawsuit, can be entered into evidence. What I have an objection to, is the introduction of evidence of a document, which I don't know where it came from. Mr. Monroe isn't here and indeed that is what hearsay is. Now there is a deposition that he took, he was under oath---all parties were represented-----I would agree that the deposi-

tion could be used. but with respect to some document that may or may not have been sent by Mr. Monroe, I would strenuously object that. That is hearsay and notwithstanding what the law is, it is not properly admissible in these proceedings." Symonds:"Let me state for the record. Mr Monroe was a party oponent. a 1220 Evidence Code itself, and administering under 1225 of the Evidence Code, it can be used as an admission of a party in interest and title. and Aug. 18, 1970----I'm sure counsel would stipulate that Mr Monroe was still the owner of the very real property that Mr. Van Orden subsequently owned. Under 1225 what he says, Mr Van Orden is charged with. Also under 1250 of the Evidence Code it shows the state of mind of Mr Monroe in regard to how the road would effect the property involved. I think there is an exception to the hearsay rule in this."

Court:"There's a problem with it, that I don't know what Mr. Monroe said in the letter, and nobody cares at the moment. but what he may have said in the letter and what he did are two different things."

Symonds:"We would like to make an offer of proof on this. very simply, the last paragraph of the letter states that: 'Enclosed is a Map prepared by our surveyor showing roads as they affect your property.'

There is a map, and we feel that this--shows the intent of Mr. Monroe, that he did not imply any kind of reservation for easement."

Court:"I think the action is selling by map, and the action is there, and that leads to confusion. I am going to sustain counsel's objection to that letter, I think it is irrelevant."

Symonds:"Well, again, I would like to make an offer of proof, This shows his state of

mind and intent, that he did not intend to have any kind of easement."

Court:"Well counsel, I don't care what he wrote in the lettter.What he wrote and what he actually did are two different things."

Symonds:"Well, we have a map."

Court:"I don't know why."

Symonds:"We have a map."

Court:"But that isn't the map, as I gather from the evidence, counsel, that anybody bought the property from, with or over, there was a map showing a road when she bought the property, there was a map showing a road when Van Orden bought the property. I sustain the objection to the letter.

Symonds:"--- what about the offer of the map itself ? We have a map here prepared by the same man who did Plaintiff's 1."

Court:"Counsel ?"

Roberts:" Well, what I would say is that

the map is even more hearsay than the letter."

Court:"The objection to both the map and the letter is sustained. Let's go."

1-5-81 Court Reporter's Transcript (33, 23-37,8)

OBJECTIONS MADE AND REVIEW SOUGHT AT REMAND HEARING.

Re: Prevailing party avoid identification of road over which judgment was affirmed.

Rabida:(opening statement) "I will make a new diagram---the lower part was land that I bought on May 25, 1970. Now, an easement by implication says, if it implies there is a right of way at the time, then the people----."

Reynolds:"Your Honor, I object to this Opening Statement because it goes beyond the issues that are before the court."

Rabida:"It is the same as your definition up there."

Reynolds:"We're talking about easement by

implication.That has already been determined."-------

Court:"The Appeallate Court said there was an easement by implication."

Rabida:"So there is an easement by implication. So whatever road existed on--this 80 acres going up to this 80 acres on May 25, 1970 is the road over which an implication can be granted. Okay? and what we're going ---- "

Reynolds:"I have to object to that as an incorrect statement ofthe law."

Court:"You are using the wrong terminology. The easement is there.It is not going to be granted to anybody. The Appellate Court has said they found the easement existed,period."

Rabida:"Okay. It was granted, Whichever road existed and use made of it on this property here---is what we're here for."

Reynolds:"I object to that, we're not talking about whatever road was there.

The Court said there was only one, and that's the one we're talking about."

Court:"Yes."

Rabida:"Which road are we talking about, your honor ? The road that existed on May 25, 1970 ?"

Court:"The road that the Appellate Court says exists on the property,"

Rabida:"Okay, that the Appellate Court says exists on the property. I will let it go at that. So whatever road exists on this property, they have granted an easement over. Okay. And that is what this case is all about. we have to determine the existing road and the use made of it as of May 25,1970, on this property for the benifit of this property up here."

Reynolds:"That is an incorrect statement of the law too, your Honor. I have to object. We're not trying to determine anything about which road. The court has found there was only one road in issue, and that's

the one we are talking about.

Court:"That's the one we're going to find."

Rabida:"That's the one we are going to find, the road that existed on May 25,1970. Okay ?"

Court:"Do you want to call your first witness ?" (Remand Reporter's Transcript (herein "RRT") 4,22-6,22)

Re: Plaintiffs Abandonning the Road and Map testified to at Trial.

Rabida:"You presented a map at trial that depicted the road that you said existed at the time you first went to the land. Is that correct ?"

Reynolds:"I object to the question, It has nothing to do with these proceedings, It is irrelevant. whatever he presented at trial has been considered and there has been a judgment."

Rabida:"Your Honor, he presented a map at trial, and he said that road existed at time he first saw the property, which was

June 1971. Now that doesn't prove what road existed on May 25, 1970, what use was made of it etc. But he has gone through that type of questioning now, and I'm sure you were going to allow it so I wasn't going to object. But now I refute it. He handed him an exhibit and he testified to it at trial. Now he is saying something different, so I want to prove that."

Court:"How are you going to prove that ?"

Rabida:"I will show him the map he presented at trial and compare it to what he is saying now, and there is a big difference. He said that road existed on my property into his at that time,--if true, proves what road existed on June 15---1971, That's what he is testifying to."

Reynolds:"The Court of Appeal has determined that there is a road over which the plaintiffs have an easement--Van Orden testified there was only one such road

that went from the lower to the upper 80 acres. Indeed that is what the Court of Appeal found. Anything else is irrelevant about maps and diagrams. We're just going to reopen the whole trial up----"

Rabida:"-----Now Van Orden testified in court that a road existed on June 15, 1971 ---as a matter of fact the same road was testified to by Floyd Walls at trial using the same exhibit. That is the road that the Appellate Court has said there is a right of way by implication, the Floyd Walls road."

Court:"Floyd Walls was a surveyor, I understand."

Rabida:"Floyd Walls was a Bulldozer Operator, and he testified to the same map Van Orden testified to. This is crucial because this is the road that the Appellate Court says---."(Case is taken up outside the presence of the Jury.) (RRT; 18,17-20-24)

Court:"What do you want now,that's what I

want to find out."

Rabida:"What I want now is to prove what the Court of Appeal has based it's decision on. and then I wanted to prove what road existed and what use was made of it on May 25, 1970."

Reynolds:"What she wants to prove is that what the Court of Appeal based it's Opinion on was wrong, and that's not what we are here for."

Court:"That's correct."

Rabida:"We're here to determine what road existed and what use was made of it in 1970. Van Orden is on the stand and you are not talking about May 25, 1970, you are talking about June 15, 1971."

Court:"If it is the same road."

Rabida:"--Well that's what I'm proving,--it isn't the same road. Ex. 1 that I am trying to get before the court now is the exhibit with the road on it that the Court of Appeal ruled on."

Court:"It would have to be marked A here."

Rabida:"It was marked 1, Exhibit 1."

Reynolds:"At trial there was evidence from --Mc Carthy that was introduced, who-----"

Rabida:"She testified to the same---"

Court:"Let him talk will you ?"

Reynolds:"Who owned the property for some 50 years---She testified as to what nature of the road was, and that this was the same road.-----Rabida has talked about Aerial Photographs and Maps, and that has nothing to do with the width of the road or the nature of the use, I object to all of it because it will keep us retrying the same old case all over again, I'm not inclined to do that.--"

Rabida:"Your Honor, you can't measure the width of the easement until we agree on which road we are talking about."

Court:"Yes, we can."

Rabida:"You can't measure two roads and say it is one---this is Exhibit 1, this is

what the Appellate Court based their--
Opinion on.--"
Court:'You can sit there and talk all day.
Van Orden has been over this road at least
20 times."----
Rabida:"I didn't hear him testify to an
exact road. He just said 'road'."
Van Orden:"The road."
Rabida:"Well, 'the road' which is 'the road'."
Van Orden:"There is only one road."
Rabida:"Well, describe it."
Court:"It's a road for heaven sake.---that
he used to get across your land to his pro-
perty."------.
Rabida:On May 25, 1970, he didn't own any
land in that area. So it wasn't to get
across my land to his land."--------.
(RRT; 21,15-23,22)
Court:"Someone else used it to get across
your land to their property."
Rabida:"That's what we here to prove, who
used it, how did they use it, to what use

did they use it.-----."

Court:"The Appellate Court took due notice of the fact that you put locks on the gate, apparently---"

Rabida:"This isn't what we are talking about. We're talking about the use of the road, not the locks."

Court:"Why don't you shut up for a minute, You keep talking and don't say anything."

Rabida:"I've said something."

Court:"The Appellate Court took due notice of the fact that there was a road across your property, that you put a fence across it, that you locked it and that people came up and shot the locks off. That's the road we're talking about."

Rabida:"We're talking about two different roads, your Honor. I testified at trial that I put a lock on-----"

Court:"I don't care whether you testified. We're talking about a road across the property."

Rabida:"Then,---- can we keep all of the testimony in this court today on May 25, 1970 ?"

Court:"I don't know how we can do that."

Rabida:"Why can't we ?"

Court:"Because."

Rabida:"That's what we're interested in, the use of the road."

Court:"That's right."

Rabida:"The width of the road."

Court:"The width of the road and---"

Rabida:"On May 25, 1970."

Court:"The surveyor went up there last weekend and surveyed it found the road 20 feet in some spots."

Rabida:"The Surveyor went up there last weekend, I have evidence from May 25, 1970. (RRT;23,25-25,7)

---Okay. I questioned him--but I can't question him on what road he is testifying to ?"

Court:"He told you there is only one road.

that's the one he is testifying to."

Rabida:"I'll let it go at that."

Court:"We have to." (RRT;25,20-25,28)

Rabida:"Show us on the (May 1970) Map which road you traveled over when you first bought your property."

Reynolds:"Objection, there is no road shown-----."

Rabida:"Which road did you travel over when you first bought ---."

Reynolds:"There is no road shown on the map."

Van Orden:"I would have to approximate it. That's why we had it surveyed."

Court:"Never mind. If there's no road shown on the map,obviously he can't point it out to you.

Rabida:"---was there only one road on my property when you bought your property ?"

Van Orden:"No. There was more than one road."

Reynolds:"Objection as to how many roads were on her property. We're only talking

about one he traveled across to get to his upper 80."

Rabida:"which road did you travel to get to the upper 80 ?"

Van Orden:"The one that went to the upper 80." (RRT;34,11-28)

Rabida:"Could you describe that road ?"

Van Orden:"Well, it went through your land, and through ravines and rather hilly country, very rugged country."

Rabida:"How did you describe the road at trial ?"

Reynolds:"Objection, how he described the road at trial." (RRT:34,29-35,18)

Re. Two Maps presented at trial vs Brown's Platting presented at Remand.

Defendant:"--this was Alan Whitlock, Monroe's surveyor who developed the property. He made out two Maps, He made one in May, which was of Proposed roads, and he made one in August which was of the Access Roads. Now, that is when

the implication arose, when those two Maps were made out. It is very relevant."

Reynolds:"It is raining hearsay."

VOrd:"May I say something, Judge ?"

Court:"You can say anything you want."

VOrd:"The problem arises because there are several maps showing different locations of the same road, and the reason for that is that these aren't really surveyed roads, They are general sketches of where the road probably is or should be or something. The only actual survey we have of this road is the one just submitted by our surveyor ,David Brown. They are all the same road but many maps depicting the same road in different places. That's what's causing the problem." (emphasis added)

(RRT; 84,10-85,14)

Re: Statutes,use of road and abandoning their trial testimony.

Rabida:"Did Milburn ever tell you that he built a road on my land ?"

Reynolds:"Objection, hearsay."

Court:"I don't know, he can answer that, if he can.--Appellate Court said there is a road there, If they said it, there is a road there, that's all there is to it. We are bound by what they say."

Van Orden:"He said they weren't building a road, but improving the road, The road was there for many years before, It was used by the Mc Carthys. That's the trial testimony." (RRT;71,9-72,1)

Rabida:"Was it used by the Mc Carthys ?"

Van Orden:"It was not a road at that time. He ran cattle.

Rabida:"How did the Mc Carthys describe the road ?"

Reynolds:"Objection, irrelevant."

Rabida:"Going to the north and to the south of their property--?"

Court:"It is completely irrelevant here

as to what the Mc Carthys said, because the easement is by implication, and it arose when the parcels were devided."

Rabida:"It is based on the road that Floyd Walls testified to--mentioned in the Opinion---That is the same road that Van Orden testified to in court---that Mc Carthys used when they owned the land. And so it is the same road that the Appellate Court is saying now there is an easement ----."

Court:"That's their privilege."

Rabida:"That's the only testimony they want--on the existence of that road, the use that was made of it---That's part of the use,the Mc Carthys, the Plaintiffs---I'm trying to get out of him as to what use the Mc Carthys made of it.---."

(RRT;72,2-72,28)

Can I read what he said at trial ?"

Court:"No, because it's immaterial."

Rabida:"It's the road they are asking

more information on."

Court:"I just can't seem to get through."

Rabida:"This may clarify some of it."

Court:"This is not going to clarify anything unless you get to another question."

(RRT;73,18-74,4)

Re: Use of road at time of implication.

Rabida: "Did he use it as access to his property,that's the use."

Court:" He testified he did. He said he has used it at least 20 times."

Rabida:"He has answered these Interrogatories--"

Reynolds:"I object to the use of these Interrogatories."

Court:"I am going to sustain it. We are not trying that old trial again."

Rabida:" I'm not trying to try the whole trial, I'm trying to get to the use of these roads. And he was asked 'to identify each person known to you or to anyone acting on your behalf who has or may have

claims to have knowledge of such conten tion as mentioned in Interrogatory #47, which is do you contend---"

Reynolds:"Your Honor, once again, I object, I don't know how to stop her, but maybe you can, I can't."

Rabida: "That's on the use of the road."

Court:"At the time you were contending you had blocked the easement by blocking the road for a period of--three years first and then five years, And the Appellate Court said no, you did not do that."

Rabida:"This has nothing to do with that, this has to do with the use of the easement on May 25, 1970."

Court:"I think you've just about exhausted the subject."

Rabida:"Mr. Van Orden, what do you contend the use of the road was in May 1970---By whom ?"

Van Orden:"I don't recall. I don't remember being there, I bought the property in

1971, and I may have gone up there in 1970, but I'm not sure."

Rabida:"Do you know the use of the road in May 1970 ?"

Van Orden:"That month, 1970, I can't say now, It's too many years later."

Rabida:"You have no testimony as to the use of the road in May 1970 ?"

Van Orden:" No,but I'm sure a buyer of the N80 would have used it even though I wasn't there to witness it. He had to get up to his parcel before he would buy it." (RRT;91,7-93,4)

Re: Statutes began to run "in early 70's.

Rabida:"What was the purpose of comming to my home in the early 70's."

Reynolds:"Objection, irrelevant."

Court:"Do you remember --the purpose--- ?"

Van Orden:"I sure do. I was trying to get Pat to agree to allow me and the other owners to go through her land, and I suggested that if she wanted to put up a gate

and lock it, that she give each owner a key, and that she would have no problems, that the public would be excluded and that this would be the simplest way to solve our problem, because she knew I wanted to go through her land to get there---She refused and ordered me out of her home." (RRT;74,22-75,10)

Re: Van Orden being aware of the Aug. 1970 Whitlock's Final Map when presenting the May 1970 Whitlock Work Map to the Court;and the existing road and the use made of it in early 70's,

Rabida:"Now, when you were in my home(in the early seventies,do you remember writing anything.--?"

Is this your handwriting ?" (RRT;75,11-14)

Reynolds:'Before you answer that,let me make an objection that this is irrelevant to the issues before this court." (RRT;75,25-27)

Rabida:"Your Honor, this is a drawing he

made of how the easement was going to go through my land into the land he sold to others as well as his own land, that is the easement that this implication is being taken on---That's relevant." (RRT;76,20-27)

Reynolds:"Your Honor, I object to this. It has nothing to do with the width of the road."

Rabida:"He came to my house demanding a right of way, this is a hearing on the easement--and he marked this when he was at my house harassing me---It is relevant."

Court:"Twelve years later the Appellate Court says there is an easement."

Rabida:"--but they asked for more information on the road as it existed and the use made of it. And this is a drawing that Van Orden made at my house showing the road as he said it existed at the time and how he was going to expand on it."

Van Orden:"That is not my signature. That

is not my writing. I don't write that way. If it is, let's say it is, I don't recall the circumstances were, who was buying what, I don't think it has anything to do with our case." (RRT;77,11-78,12)

Rabida:"This is part of the property that is going to be served by an easement over my land,--this is how he showed he was going to extend the road up in the N80."

Court:"The N80 has nothing to do with this."

Rabida:"He was showing how he was going to come off my land into the N80,which would be an easement through my land."

Van Orden:" I may have drawn on this map. In fact, I think I did.because it does look like my writing where I put 'Moya' and some other names. I have drawn there is where I did think it was at the time, and actually you will find from the Survey Map, that it is in a different location. --Now it is moved over somewhat. but what difference does that make to Pat or me ?

And it's certainly irrelevant to the case."
(emphasis added)

Rabida:"Does this indicate that you were aware that this map existed at that time ?"

Van Orden:"I was aware of such a map."
(RRT; 78,19-79,17)

Reynolds:"So what ? It's irrelevant"

Van Orden :"It didn't show a survey, my impression as to where the road would go."
(emphasis added)

Rabida:"What is the title of the Map ?"

Court:"It says,'Map Showing--Access Roads in the Southern Portion of Section 11.'"
(emphasis added)

Rabida:"So the Map shows Access Roads into my property ?" (RRT;80,1-20)

Reynolds:"Whatever the map says has nothing to do with this trial. We're talking about width."

Rabida:" The surveyor surveyed my land at the time I purchased the land, your Honor. This Map is marked Aug. 1970. I bought in

May 1970. This Map says Accress Roads as they existed on the SE portion of Section 11, which would be our Section."

Court:"That's true."

Rabida:"And this is a survey by Whitlock."

Reynolds:"That piece of paper is hearsay."

Court:"Who is Alan Whitlock ?"

Rabida:"He was the surveyor---"

Van Orden:"He's dead, He did not."

Rabida:"Who surveyed the land at the time."

Van Orden:"He is deceased now. That does not show a survey location of that road. It is just sketched in generalities."

Rabida:"You sketched in, but his basic Map is not sketched in.<u>This is the Final Map.</u> This is a Survey Map." (emphasis added)

Van Orden:"It isn't."

Reynolds:"Your Honor, this is hearsay. It is irrelevant, I'm asking the court to restrict her examination on this point so we can finish within the year 1989."

Court:"If we're lucky."

Re: May 1970 Whitlock Map on which the Judgment was affirmed.

Rabida:"Have you seen this map ?"

Reynolds:"Your Honor,I object to any Maps. ---Diagrams, Aerial Photographs, or anything else being offered on anything other than the issue of the width of the road and the use."

Rabida:"The width of the road and the use of it in May 1970."

Court:"Not the--they said the road was there, period. The width is in question and the use made of it is in question. But the fact that the road is there is now binding on us, period."

Rabida:"Then we have to discern which road it is, because that's my property that is going to be burdened by it, and it can't be just any old road, because there have been all kinds of roads testified to. It is going to be located on my property somehow. It can't be over 50 roads."

Court:"It's your property, but it is burdened by an easement, and you are the servient tenant."

Rabida:"I have to know where the easement exists."

Court:"There is a Map here."

Rabida:"Which Map ?"

Court:"By Mr. Brown, the surveyor."

Rabida:"That Map was created last week. It doesn't show the road as it existed in May 1970."

Van Orden:"It has never changed, the location of the road has never changed.--There are different pictures of it, but the road itself has never changed."(RRT;81,1-83,7)

Rabida:"--Now they are asking for information that existed in May 1970."

Court:"I am well aware of what they are asking for."

Rabida:This Map is dated May 1970."

Court:"It is dated Aug. 1970."

Rabida:"No. This is the other Map, May

1970."

Court:"How many Maps do we have ?"

Rabida:"That's the problem, your Honor, we have different Maps and they haven't been described to the Court of Appeals,

Reynolds:"We've got one road, and showing all these Maps is doing nothing but clouding the issue,because the Appellate Court has ruled that we have an easement over the existing road. The surveyor testified there is only one, and that's the one we are talking about,

Court:"Mr Van Orden says there is only one road."

Rabida:"This is Monroe's Survey, who developed the property, This was Alan Whitlock, Monroe's surveyor who developed the property. He made out two Maps. He made one in May, which was of Proposed Roads and he made one out in August which was of the Access Roads. Now, that is when the Implication arose, when those two Maps were

made out. It is very relevant."

Reynolds:"It's raining hearsay."

Court:"You have to have someone authenticate the Map with something else."

Rabida:"Okay." (RRT;83,15-84,22)

Re: Markings made by Van Orden on the May 1970 Whitlock Map.

Rabida:"Did you make any markings on this map (Ex. One;May 1970 Whitlock Map)--yourself ----?"

Reynolds:"Objection, irrelevant."

Van Orden:"I may have, but I don't remember for sure. ---If I did, again, I was just approximating something. There was no surveying of the road---it was something that was planned or where I thought it was or something like that. "

Rabida:"This is from your deposition, and I can find where it was that you actually followed this road, if you want."

Van Orden:"Well, I have no objection to saying that I hand sketched some road in

there, or where I planned to put a road in there." (emphasis added)

Reynolds:"I object. Your Honor, we're not trying to affix the road."

Rabida:" If the road is there physically, it is there---I'm not trying to take the road up from the ground and push it some place else. The road is there."

Reynolds:"If the road is there,we don't have to talk about Maps."

Rabida:"I want to show the Court what the testimony was, what the confusion is over roads." (RRT;87,10-88,14)

Re: Contradiction of trial testimony.

Rabida:" Mr Van Orden, you said--May (June) 1971 was the first time you saw the land --were you given a Map at that time ?"

Reynolds:"Objection irrelevant."

Court:" He can answer if he can."

Van Orden:"I don't think so. No."

Rabida:"I'd like to give you a moment to

recollect."

Van Orden:" I will explain why. Milburn, who bought the--N80 originally, was a good friend of mine, I bought 40 from him mostly because I relied on him, and I wasn't concerned with many details. and I don't remember having a map at that time." (RRT;26,17-27,3)

Re: Bell-Shaped-Curve Road on which Judgment was affirmed.

Rabida:"Have you ever testified to a Bell-Shaped-Curve Road--?"

Reynolds:"Objection."

Court:"It is irrelevant." (RRT;99,3-10)

Re: Long Continued Use.

Rabida:"I feel this is relevant because the land was owned by the Mc Carthys to begin with, and this easement supposedly existed at the time they owned the land."

Court:"We don't care who owned the land beforehand. The Piute Indians prbably owned it and we probably stole it from them.

But the Appellate court said the easement arose when the property was devided 80 and 80, or whatever it is."

Van Orden:"There was no need for an easement before that time."

Rabida:"What did you testify at trial--concerning what use the road had before my ----?"

Reynolds:"Objection what he testified to at trial is irrelevant."(RRT;67,23-68,9)"

Rabida:"And so this testimony was at the trial."

Reynolds:"That's why it is irrelevant here."

Court:"That's right, that's why it is irrelevant here. I don't think it gets through to you."

Rabida:"Your Honor, it is not irrelevant here really, because--the Mc Carthys owned a lot more than 160 acres."

Court:"I'm telling you, I'm making the ruling that it is irrelevant period. No further questions along that line."

(RRT; 68,18-27)

Re: Width and use of road.

Rabida:"Do you remember saying a boulder fell across the road ?"

Reynolds:"Objection, irrelevant."

Rabida:"We're suppose to have testimony on the use and the width of the road."

Reynolds:"I don't know what relevancy it has."

Court:"I don't either, but lets let her go."

Rabida:"You testified--that a boulder fell on the road and blocked it off."

Van Orden:"If I testified to that effect, it was the truth at the time."

Rabida: "So, How big was the boulder ?"

Reynolds:"I object."

Rabida:"This goes to the width of the road, your Honor-----According to the width of the boulder, we can estimate the width of the road."

Reynolds:"We have testimony that it is 20 feet wide."

Rabida:"---I have a right to give my side of it and the right to question about it. If it's going to be one sided then--."

Van Orden:"There would be no point in my denying that there was a boulder there---."

Rabida:"Yes, and you said the boulder completely blocked off the road so you stoped using it and left the little deal for me.--If a boulder could block off the whole road, the road can't be very wide, can it ?"

Reynolds:"It would depend on the size of the boulder,"

Van Orden:"It could block off half of the road and you couldn't get by it."

Court:"In any event, do you have further questions-----?" (RRT;68,28-71,8)

Re:"No easement in June 1971.

Rabida:"In your grant deed from Milburn, was there an easement (to) any other land ?"

Reynolds:"Objection, irrelevant."

Court:"I don't know, it might be."

Van Orden :"I know of no other easements."
(RRT; 60,6-15)

Rabida:"You bought the land from Milburn, the land to be served by the easement---- Was it listed in your Grant Deed ?"

Reynolds:"Objection, irrelevant."

Court:"It's irrelevant because the Appellate Court said there was an easement there."

Reynolds:"If it were on her land, how could it be listed on his?"

Rabida: "---If he has an easement in his Grant Deed, it probably says over what road."

Court:"The Appellate Court said there is an easement by implication, which means it was not recorded, it was not shown on a map."

Van Orden:"The answer is 'No', <u>that's what necessitated all our problems. There was no easement when I bought the property, and I wasn't aware of it at the time."</u>
(RRT;60,20-61,15)

Re: Grantor-Grantee relationships.

Rabida:"Did I ask who you bought from ?"

Reynolds:"Yes you did. Milburn and Milburn bought from Monroe." (RRT;97,10-12)

Rabida:"What did your grantor tell you in regards to the road over my land ?"

Reynolds:" Objection, assumes facts not in evidence, and it is irrelevant."

Court:"If anything."

Rabida:"If anything."

Van Orden:"The question of easement did not come up. I wasn't aware of it until you put up your gate and kept me out of my property." (RRT;95,11-20)

Rabida:"So what did you do to find out whether or not an easement existed ?"

Reynolds:"Your Honor I object. It is irrelevant. This is the last trial, We're back to the same old evidence."

Court:"We certainly are. The objection will be sustained." (RRT;95,24-96,2)

Re. Van Orden's Joint Venture with Milburn.

Rabida:"Was this in connection with a Joint Venture you had with Milburn ?"

Van Orden:"That was an informal partnership, It wasn't a Joint Venture---formal Joint Venture."

Rabida:"Wasn't it to subdivide the land, the 80 acres ?"

Van Orden:"No. Milbourne bought the 80 and sold me 40. and we were friends so we worked together on the improvement of the property and the selling of the property, of some of it." (emphasis added)

Rabida:"Again, your deposition says--"

Reynolds:"Your Honor, whatever the deposition says, we're talking about width at this point, and this is all irrelevant."

Rabida:"He made a statement --and it contradicts what he said in his deposition. ---He just said that his Joint Venture was not to subdivide the 80 acres, I'm going to show in his deposition he specifically says that's what he joined Milburn for."

Reynolds:"That's irrelevant because it has nothing to do with the width and the prior use."

Court;"You are absolutely right."

Rabida:"May I give it to refute his answer ?"

Court:"No , it is completely irrelevant."

Rabida:"It shows he gave a different answer."

Court:"It is completely irrelevant--"

(RRT;99,17-100,19)

Rabida: "You made a statement that--you relied on Milburn's honesty, a minute ago."

Van Orden:"At that time, I did."

(RRT;32,24-27)

Rabida:"Do you contend that you relied on Milburn's veracity at the time you joined him in a Joint Venture ?"

Reynolds:"Objection irrelevant. We're talking about the width of the road."

Rabida:"He just made the statement, your Honor. If he makes statement, I have the right to show whether or not it is true."

Court:"Look,how many times do I have to tell you, the Appellate Court says there are only two things to be determined, the place of the road, the width of the road and the use at time it was created. and what he said in some other case is completely irrelevant.(emphasis added)

Defendant:"Because I want to show his veracity. - (RRT;33,13-34,3)

Re: Avoidance of first party witnesses.

Rabida:"Is Milburn going to be called to testify ?"

Reynolds:"Objection. Irrelevant."

Court:"He has put his last witness on."

Rabida:"Milburn has first hand information, and so does Monroe."

Court:"Subpoena them."

Rabida:"--my attorney at trial said that it was up to them---"

Court:"If you want to subpoena them, that's fine, but they are not going to be produced by Mr. Reynolds."

Van Orden:"They have no knowledge of the width of the easement." (RRT;61,22-62,10)

Re: Van Orden's duties in the group.

Rabida:"Do you remember making the statement that as part of your living you take care of problems like this ?"

Reynolds:"Objection, irrelevant, nothing to do with the width or prior use."

Court:"The objection will be sustained,"

Van Orden:"I answered it anyway, it was a hobby." (RRT;95,1-8)

Re: Owners of the easement.

Rabida:"I have a diagram here I would like to show you. Now the Complaint was filed August 1977 was it not ?

Van Orden:"Yes, I believe so."

Reynolds:" I Object and move to strike, It doesn't make any difference when it was filed.

Court:"I don't understand where we're going."

Rabida:"He asked Van Orden whether or not

he owned land in that property at the time. Now what I am trying to establish is who owned land at the property at the time, because whoever owned land---at the time, has a right of way through my land according to the Court of Appeal, and I'm trying to establish whether they all do or just VOrd. Since he asked the question, I'm just following through."

Court:"Well, I can answer the question for you. The Court of Appeals said there is an easement across your property."

Rabida:"In favor of who ?"

Court:" In favor of the people in the N80, or whatever it is."

Rabida:"That's what I'm trying to establish now."

Court:" It's been established now."

Rabida:"Not who owned the properties, that has not been established. He asked VOrd if he owned the property up there. Right now he asked him, Okay ? I asked him about his

answer in his deposition, Now, I want to know if the other plaintiffs owned any property."

Court:"He has answered the question."

Rabida:"Not yet."

Court:"He said, as far as they know , they do,"

Rabida:"Is there anything wrong with this diagram, Mr Van Orden, Can you tell me anything that is wrong ? I made this----."

Reynolds:"I object, Mr VOrd---."

Rabida:"This goes to the veracity, your Honor, of his testimony."

Reynolds:"I would also----."

Rabida:" This diagram has been composed from the microfish in the Halls of Records on Section 11---which I have here."

Reynolds:"I also object on the grounds that it is vague, is there something wrong with it ? I don't know what that means. He didn't draw it."

Rabida:"Okay. I withdraw the question,

May I leave it in evidence ?"

Court:"You have to. Except it is not in evidence, It is just marked as an exhibit."

Van Orden:"May I just say one thing ?"

Reynolds:"No."

Rabida:"Okay."

Van Orden:" It affects my previous statement. When I said I did own land, it may have been in my son's name at the time, and that may be why I said 'no' in my deposition." (RRT;16,16-18,15)

Re: Dates of locked gates.

Rabida:"Could you give an idea to the Court how often you saw the land before (June) 1971 ?"

Court:"What difference does it make ?"

Rabida:"He has testified to something---"

Court:"Tell me--."

Rabida:"---that shows he knew the property way before 1971."

Court:"What has that got ot do with it ?"

Rabida:"We're talking about roads that ex-

isted in 1970, and we're talking about the veracity of this gentleman. Is he lying ?"

Court:"I don't have the faintest idea."

Van Orden:"I'm not lying. I don't lie."

(RRT;29,11-27)

Rabida:"---He testified that first I locked the first road, then I had another road built a year later and I padlocked that too. Now, when I built the second road was Oct. 27, 1971, So he saw the land a year before that."

Court:"I'm going to sustain the objection, because I don't see the relevancy of it, quite frankly." (RRT;32,9-22)

Re. Exhibit B:

When Ward presented Exhibit B, saying it was a Map that he had prepared according to the Brown's description of easement, Judge Nairn, on his own initiative, swiftly moved it into evidence and Reynolds asked for a copy.saying he had no objections. (RRT;121,9-24)

Later, again on his own initiative, Judge Nairn removed it from evidence,

Judge Nairn: "It doesn't have any relevancy to this case." (RRT:165,9-14)

Re.Reynolds influencing the tribunal.:

After Jurors were excused for the day.

Reynolds:'I would ask the court to, in making up it's mind, to consider the direction in which we are going, because I think we're just 'opening up Pandora's Box' and we will be back in the Fifth again with Mrs Rabida , and starting all over from scratch."

Court:"That's her sole purpose, is to go back to the Fifth."

Reynolds:"I'm trying to limit what she will do once she gets there. I think we are entitled to restrict her as to what the Appellate Court said this trial was to be about,When we start talking about Whitlock Maps and Bell-Shaped-Curves, we can't determine anything from the Photo-

graphs. I think in any event, it ought to be excluded under 352 because there is no limit to how long we will go. I would ask the court to consider those facts.

Court:"We will give it a go."

(RRT;115,11-116,3)

It is to be noted that during defendant's Final Argument Judge Nairn declared: "That's when (May 25, 1970) the Easment by Implication may have arisen, but it doesn't say there was a road there at the time." (RRT;151,9-11)

Re. Special Verdict:

Rabida:"I would like to know, the two questions that you are asking the Jury, where did they come from ?"

Court:"Mr. Reynolds drew them up."

Rabida:"---why wasn't I able to do that ?"

Court:"Yes, you could have submitted questions, proposed questions."

Rabida:"I thouhgt the Jury Instructions would do that.."

Court:"No, the questions as proposed by Mr. Reynolds accurately state the issues in the case."

Rabida:"Well, the questions that I would have written would state the issues in the case as far as my side goes.

Court:"Well, there is only one side to tell you the truth."

Rabida:"I know.--and that is ?"

Court:"And that is the width and the use of the road and that's it"

(RRT;165,15-166,4)

Re. Evidence and/or Exhibits as presented at Correction of Record.

The Monroe to Smith Deed was presented at Remand Hearing, When defendant reviewed her papers she found that this deed had been slipped back into her papers.

This deed showed that Monroe had transferred the 80 acres to the north off the N80 to Smith prior to conveying the N80 to Stoye Milburn.

When defendant received her transcript to the Aug. 7 & 8, 1989 Remand Hearing, she found that her testimony relating to this deed had also been removed. Defendant addressed this omission in her "Correction of the Record" #3 at page 2.

Rabida had repeated the testimony in her Closing Statement. (RRT;150,9-18)

POINTS DEFENDANT PRESENTED IN 1991 APPEAL

Defendant Prejudiced by Jury Instructions and--Element of Surprise;

--Width of Easement at--Implication does not Support --Judgment.

Judgment--not Supported by Use--Road was was put---at---Implication;

(Defendant's) Remand Testimony on use of Easement at Time of Implication Supports Allegation of Cross-Complaint.

Issues not Raised on first Appeal Can be Raised on the Second Appeal:

Second cause of Action Unsupported by Testimony;

Judge Erred in Denying Motion for Non-Suit Based on Statutes Having Run on First and Second Cause of Action;

Judgment Cannot be Sustained in Absence of Grantor-Grantee Relationship Between (parties) Plaintiffs and Defendant;

Judgment Cannot be Sustained in Absence of Separation of Title Between the Servient and Dominant Estates;

Allegations of Complaint Insufficient to Support Cause of Action;

No Substantial Finding on First Cause of Action;

An Easement Will Not be Implied Contrary to the Expressed Intent of the Parties;

Deceit Designed to Cheat Defendant Out of Her Property;

Defendant Prejudiced by Court's Bias-----;

POINTS IN PETITION FOR REHEARING:

The Inference (ascending line of BSC vs. Diagonal Road) was Never Made at Trial, "It Can Be Seen With the Naked Eye That it

Constitutes a Relocation of the Easement.---The Inverted Angle Formed by The Two Roads Encompases--- Approximately 3 Acres.

She further contended:Diagonal Road (Exhibit 2A) ends in VOrd's lot whereas the ascending line of the BSC ends just east of centerline to Knapp's lot. These two endpoints being "more than 400 feet apart."

Defendant submitted an overlay of the two roads to give visual meaning to Ward's testimony. (See 52,11-21-53,12 & Appendix O)

"Opinion Filed 9-5-91 Contains Several Mis-Statements of Testimony;

Issues Not Pleaded, or Raised at Trial Can-Not Be Reviewed on Appeal;

Law of the Case is Inapplicable---..(Due to prevailing parties' Remand testimony)

There is Substantial Difference in the Location of the Diagonal Road From That of the BSC Road.(Relocation of Easement);

The Trial Judge Erred in Allowing Brown's Aug. 4, 1989 Platting and Legal Descrip-

tion to be Introduced Into Evidence Instead of the May 1970 Whitlock Work Map, on Which the 1985 Opinion was Based;
Transferring Easement---Constitutes Relocation-----Without Consent---------.
Neither Bell-Shaped-Curve nor Brown Diagonal Road Existed at ---Implication;
BSC Road Has Never Existed From 1929 Through 1975;
All Exhibits Presented---Are Deemed Part of Clerk's Transcript;
The Reviewing Court Cannot Ignore Direct Evidence;
Corroborative Evidence Proves That The N-S Road Was Constructed Between (Aug.) 1970 and 1975;
Use of Dominant Tenement Prior to Implication Does Not Support Creation of Easement;
Verified False Allegations of Complaint Cannot Support Action;
Parties to Complaint are Third Parties to Defendant's Title and Are Not The Real Parties in Interest----

PLAINTIFFS' TRIAL EXHIBITS (1980-1981)

Ex.1; 8 X 11 Zerox Copy of May 1970 Whitlock Work Map.

Ex.2; Topo Map of Piute Peak Area.

Ex.3; Dec. 1975 Monroe Letter to Joseph B. Van Orden.

Ex.4; Phyllis Mc Carthy's Declaration.

PLAINTIFFS' REMAND EXHIBITS

Ex.1; Brown's "Platting" or "--picture of the road (Diagonal Road) in general, general direction." (8-7-89 RT;page39, lines 12-18)

Ex.2: Brown's Legal Description of Diagonal Road i.e."(F)irst Three Pages of--Document--Labeled 'Exhibit A'----." (See 8-6-89 RT page 39, lines 19-21)

Ex.2A; Same as Ex.2. (See 8-6-89 RT page 36, line 24 to Page 37,line 3.)

EX.3; Kern Co. Bldg. Regulations. Submitted by Senior Planner Ross Elliott of the "Kern County

Planning and Development Services."
certified by Ross Elliott himself.
(See 8-7-89 RT Page 47, lines
15-28;page 48, lines 13-16)

Ex.4; Board of Supervisors'"Kern County
Parcel Map Ordinance"
certified and presented by Ross
Elliott.(8-7-89 RT:Page 49,
lines 20-28)

Ex.4A;"Recodified" version of Ex.4,
"with different section numbers."
(See 8-7-89 RT;Page 51, lines 5-9)

Ex.5; "Letter from Deputy Fire Chief to
People who Build Projects in Kern
Co." which "paraphrases Ordinance
G3751"--"enacted" after 1984."
(See 8-7-89, RT;53,19-23;57,28; 58,
12-18;

DEFENDANT'S TRIAL EXHIBITS (1980-1981)

Ex.A; Bottom of May 1970 Whitlock Work Map.

Ex.B; Hand-drawn Diagram of First Road Constructed on Defendant's Land.

Ex.C; Hand-drawn Diagram of Second Road Constructed on Defendant's Land.

Ex.D; Hand-drawn Diagram of Third Road Constructed on Defendant's Land.

Ex.E; 7-19-75 Aerial Photograph

Ex.F; 6-12-40 Aerial Photograph

Ex.G. 7-23-62 Aerial Photograph

Ex.H. 4-23-70 Aerial Photograph

Ex.I; 4-25-70 Aerial Photograph

Ex.J; 7-2-70 Aerial Photograph

Ex.K; Monroe's 8-18-70 Transmittal Letter of the Aug.1970 Whitlock Map.

Ex.L; Aug. 1970 Whitlock Map which Monroe conveyed to Defendant on 8-18-70.

Ex.M; Sept. 28, 1970 Monroe to Milburn Deed.

Ex.N; June 9, 1971 Milburn to Van Orden Deed

Ex.O; May 25, 1970 Monroe to defendant Deed

DEFENDANT'S REMAND EXHIBITS

Ex.A; Flow Chart of conveyances in N80.

Ex.B; Don Ward's Map from Plaintiffs'Ex.2A.

Ex.C; Mc Carthy to Monroe & Harris Deed.

Ex.D; John Varin's Oct. 27, 1971 Invoice

Ex.E; July 1975 Aerial Photograph.

Ex.F; Certified True Colored Photograph of Original May 1970 Whitlock Work Map with True Zerox Copy of Same.

Ex.G; David Brown's Aug. 4, 1989 Platting

Ex.H; 4-23-70 Aerial Photograph

Ex.I; 4-25-70 Aerial Photograph

Ex.J; 7-2-70 Aerial Photograph

Ex.K; Aug. 1970 Whitlock Map

Ex.L; Monroe's Aug. 18, 1970 conveying letter of said Map to Defendant.

Ex.M; Front and Back of Aug. 1970 Whitlock Map Bearing Van Orden's notations.

Ex.N; Tracing of Road from July 1975 Aerial Photograph.

Ex.O. Topo. Map of Section 11.

Ex.P; July 13, 1970 Monroe to Smith Deed.

Supreme Court, U.S.
FILED
JUN 30 1992
OFFICE OF THE CLERK

No. 91-1907

IN THE

SUPREME COURT OF THE UNITED STATES

JAN. TERM, 1992

Patricia Rose Rabida,
PETITIONER

vs.

Joseph B. Van Orden, Jay Van Orden, Charles W. Mc Gowan III, Kent and Patricia Wardell, Stoye and Anna Milburn, Alfred O. and Betty Jane Knapp, Russell J. Knapp.
RESPONDENTS

NOTICE OF RELATED CASES

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Case No.CV 91-1770 RJK (TX) was filed in the Federal Court on April 2, 1991 during the two year delay in the State Court of Appeal's Opinion in No: 5 Civil Fol2692 relating to Sup. Ct. No.148 546.

CV 91-1770 RJK (TX) is a 353 page comprehensive document containing 143 exhibits labeled "A" to "M 6".

This case cites 41 causes of action relating directly to case No. 148 546, giving concrete facts which led to a 21 year controversy culminating in a 14 year litigation, and (according to court reporter Ron Horlacker in 1982) "the biggest file up here".

This case alledges, inter alia, that each and every attorney representing the respondents herein and/or Robert C. Monroe, were in the land business with their clients. Furthermore, each and every attorney representing the Petitioner

herein, except her trial attorney, litigated against their client's interest with willfullness, forcing her to litigate her own case "in the eleventh hour." The Causes of Action are:

I. GEOGRAPHICAL PROXIMITY OF ORIGINAL GROUP.

II. COMMON LONG TERM ASSOCIATIONS.

III. EARLY ACTIVITIES IN KERN COUNTY.

IV. NUMEROUS ESCROWS AND BANKING TRANSACTIONS BY MONROE.

V. OTHER MEMBERS HAVE MANY TRANSACTIONS BUT FEW ESCROWS ETC.

VI. GROUP CONSIST OF ILLEGAL SUBDIVIDERS.

VII. FORGERY, PARTY TO FORGERY, MAIL FRAUD, DECEIT AND CONSPIRACY IN LAND CONVEYANCES BY GROUP MEMBERS, ESCROW OFFICER AND NOTARY PUBLICS----.

VIII. GROUP EXCHANGED LAND WITH BULLDOZER OPERATOR,SALESMAN IN SUBDIVISION, NOTARIES TO DOCUMENTS OF CONVEYANCES, BANKING OFFICIALS AND THEIR FAMILIES.

IX. OTHER ASSOCIATIONS IN KERN COUNTY LAND BY THE GROUP.

X. GROUP MEMBERS OPERATED WITHOUT LICENSES.

XI. INVASION OF PRIVACY ON PETITIONER'S LAND & PETITIONER ACCOUSTED BY LEATHAL WEAPON.

XII. INVASION OF PRIVACY IN PETITIONER'S HOME.

XIII. USE OF PUBLIC OFFICIALS TO HARASS PETITIONER IN HER HOME AND ON HER LAND.

XIV. PETITIONER HARASSED AT HER NEW RESIDENCE. (AFTER FLEEING HER HOME)

XV. DEFENDANTS HEREIN CONSPIRE WITH CONTRACTOR AND HIS EMPLOYEE FOLLOWING EXTENSIVE DAMAGE TO PETITIONER'S HOME.

XVI. PETITIONER HARASSED BY FRAUDULANT CLAIMS & CONSPIRACY TO COMMIT MAIL FRAUD VIA U.S. MAIL.

XVII. PETITIONER WAS SEVERELY DAMAGED ----.

PART II

XVIII. AUTHOR OF COMPLAINT IS A MEMBER OF THE GROUP.

XIX. PETITIONER'S ONE OF MANY CASES FILED.

XX. CONSPIRACY, PERJURY, SUBORDINATION TO PERJURY, FRAUD AND DECEIT RELATING TO COMPLAINT FILED IN CASE NO.148546.

XXI. PETITIONER'S ATTORNEY JOINS IN THE CONSPIRACY.

XXII. CONSPIRACY AND DECEIT BY (attorney) KERR, RE. INTERROGATORIES.

XXIII. MAPS AND ROADS IN THE S80 FROM 1969-1988.

XXIV. CONSPIRACY AND DECEIT AT DEPOSITIONS BY MONROE, VAN ORDEN, AND ATTORNEYS KERR, ROBERTS AND SHANE.

XXV. CONSPIRACY AND DECEIT BY VAN ORDEN, AND MC GOWAN IN DESCRIPTION OF PURPORTED PRIOR EXISTING ROAD IN "S80".

XXVI. CONSPIRACY, DECEIT REGARDING THE NUMBER OF ACRES INVOLVED.

XXVII. JUDGE JERALD K. DAVIES JOINS IN THE CONSPIRACY.

XXVIII. ATTORNEY WILLIAM PALMER AND JUDGE WILLIAM A. STONE JOIN THE CONSPIRACY.

XXIX.(ATTORNEYS) PALMER AND SHANE CONSPIRE TO RELEASE MONROE AND MAIL FRAUD.

XXX.TRIAL JUDGE JOHN M. STANTON JOINS THE CONSPIRACY.

XXXI.JUDGEMENT IN CASE #148546 VIOLATES THE FUNDAMENTAL INGREDIENT OF PROCE-DUE PROCESS U.S.C.A. CONST.AMENDS. 5 & 14 IN THAT THE ADJUDICATOR WAS VERY PARTIAL AND HAS INFECTED THE TRIAL WITH FUNDAMENTAL, FLAGRANT UNFAIRNESS WHICH ,MORE THAN LIKELY, CHANGED THE OUTCOME OF THESE HEARINGS.

PART THREE

XXXII.APPEALS ATTORNEY, SYLVIA T. WHITMORE JOINS IN THE CONSIRACY.

XXXIII. APPEALS ATTORNEY,STUART ZIMRING ET AL JOINS IN THE CONSPIRACY.

XXXIV.JUDGE ROBERTT BACA AND ATTORNEY ROBERT P. MC NAMEE JOIN IN THE CONSPIRACY.

XXXV. CONSPIRACY CONTINUED THROUGH REMAND HEARING BY JUDGE JOHN M. NAIRN, VAN

ORDEN AND ATTORNEY HARRY M. REYNOLDS.

XXXVI.JUDGEMENT IN CASE NO. 143 612 VN VIOLATES THE FUNDAMENTAL INGRDIENT OF PROCEDURAL DUE PROCESS U.S.C.A. CONST. AMENDS. 5 & 14 IN THAT THE ADJUDICATOR WAS VERY PARTIAL AND HAS INFECTED TRIAL WITH A FUNDAMENTAL AND FLAGRANT UNFAIRNESS WHICH MORE THAN LIKELY CHANGED THE OUTCOME OF HEARINGS.

XXXVII.CONSPIRACY TO DELETE THE AUG. 1970 MAP AND GRANTOR'S TRANSMITTAL LETTER FROM THE RECORD.

XXXVIII.CONSPIRACY TO FALSIFY THE RECORD JUDGE NUNLEY, AND (ATTRORNEYS) AUSTIN C. SMITH, SYLVIA WHITMORE AND (COURT REPORTER) LA GRETTA REYNOLDS.

XXXIX.EVIDENCE THAT REPORTER'S TRANSCRIPTS WERE CONTRIVED.

XXXX. ATTORNEY CARL LINDSTROM JOINS IN THE CONSPIRACY BY AIDING AND ABETTING WHITMORE'S ATTORNEYS.

XXXXI. COMMON DESIGN AND SCHEME UNDERLYING WITHIN CAUSES OF ACTION.

XXXXII.ON ALL CAUSES OF ACTIONS INVOLVING ATTORNEYS; SUBORDINATION TO PERJURY, MALPRACTICE, NEGLIGENCE, CONSPIRACY TO OBSTRUCT JUSTICE, ABUSE OF PROCESS, IMPEDIMENT OF CONSTITUTIONAL RIGHTS TO DUE PROCESS AND SPEEDY TRIAL.

XXXXIII.JUDGES,DAVIS, STANTON, BACA, NAIRN AND NUNLY ARE GUILTY OF MISCONDUCT IN OFFICE, ABUSE OF PROCESS, IMPEDIMENT TO A PARTY'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND A SPEEDY TRIAL.

NOTE; Cross-Complaint No.143 612 VN by petitioner Patricia Rose Rabida was incorporated by reference into Case No. CV 91-1770 RJK (TX).

No. 143612 Sylvia T Whitmore (See XXXII at pg. 5 supra) sued for $13,000.00 in attorney's fees. Stuart Zimering filed a Cross-Complaint which Petitioner attempted to have amended

Present status: Judge declared Mistrial which was then changed to "Non-suit".

Related Case: Case No. 695302

This case relates to Robert Stroughter Sr. who was instrumental in attorney Robert P. Mc Namee being retained in case No. 148546.

Robert P. Mc Namee was immediately taken off the case for conspiring with attorney Harry M. Reynolds against his own client. He was named as a defendant in case CV 91-1770 RJK (TX). He had closed his office and could not be located to be served. According to the local Bar Association, Mc Namee has been silenced.

Robert Straughter was paid $2,000.00 to locate honest attorneys and review their performance at initial hearings in case # 148 546 and 143 612 VN. Stroughter also also contracted for a loan of $5,000.00 to be paid off in 3 months.

Case was filed Dec. 5, 1989.

Cancelled checks were presented to the court evidencing said arrangements.

Present status: Judge Reed Ambler is working deligently to have the case dismissed although he has not stated the grounds underlying his intent to dismiss.

I, Patricia Rose Rabida have accused Judge Read Ambler of siding against me to protect fellow judges (in Kern).
It is possible that Hon. Peter Stone of San Jose Superior Court is related to Hon. William A Stone of Kern County but I have not been able to find out.
Re. Related Case No.PC003197:
This case arose out of my employment by San Fernando Hospital, wherein I filed for Breach of Contract, Loss of Wages , Emotional Harm and Deceit. filed on March 15, 1991.
Because of concurrent cases I asked a newly admitted to the bar, to represent me on this case as well as the above

(Straughter) Case. I told her that the opposition had not yet filed an answer therefore I needed a Default Judgment filed, and in the Straughter case I needed a Summary Judgment and/or Answer Insufficient to Constitute a Defense to be filed. Attorney Candice Blaz set up an appointment to review the files. It turned out that she was sharing offic quarters with Sylvia T. Whitmore (See XXXII at page 5 herein) Attorney Blaz telephoned me to say that it didn't matter that an aswer hadn't been filed. She said that I had to wait and see how long they waited to file their answer. Next thing I knew they filed an answer, I filed for a default judgment wherein the court deemed that the law allowed them a 10 day extension. Since then this case has also gone from bad to worse So far each rule of court has been bent to accommodate my opposition.

BEST AVAIL

It is to be noted that my means of making a living was a prime target in the original 148 546 case. (See XII-XV at page 3 herein)

Prior to case 148 546 I had no trouble whatsoever with employment. At the time 148 546 was filed I was a supervisor in a large reference laboratory. Since that case was filed I have had to look outside my profession because when I did get hired I was "let go" under strange and unussual circunstances. (As in this case)

Conclusion:

The above cases are interdependent with each one enhancement to the others. As such the ends of justice would best be served by all cases being presented to the same tribunal in the order in which they arose.

Dated: June 24, 1992

Respectfully Submitted Patricia Rabida

Patricia Rabida
in Pro Per

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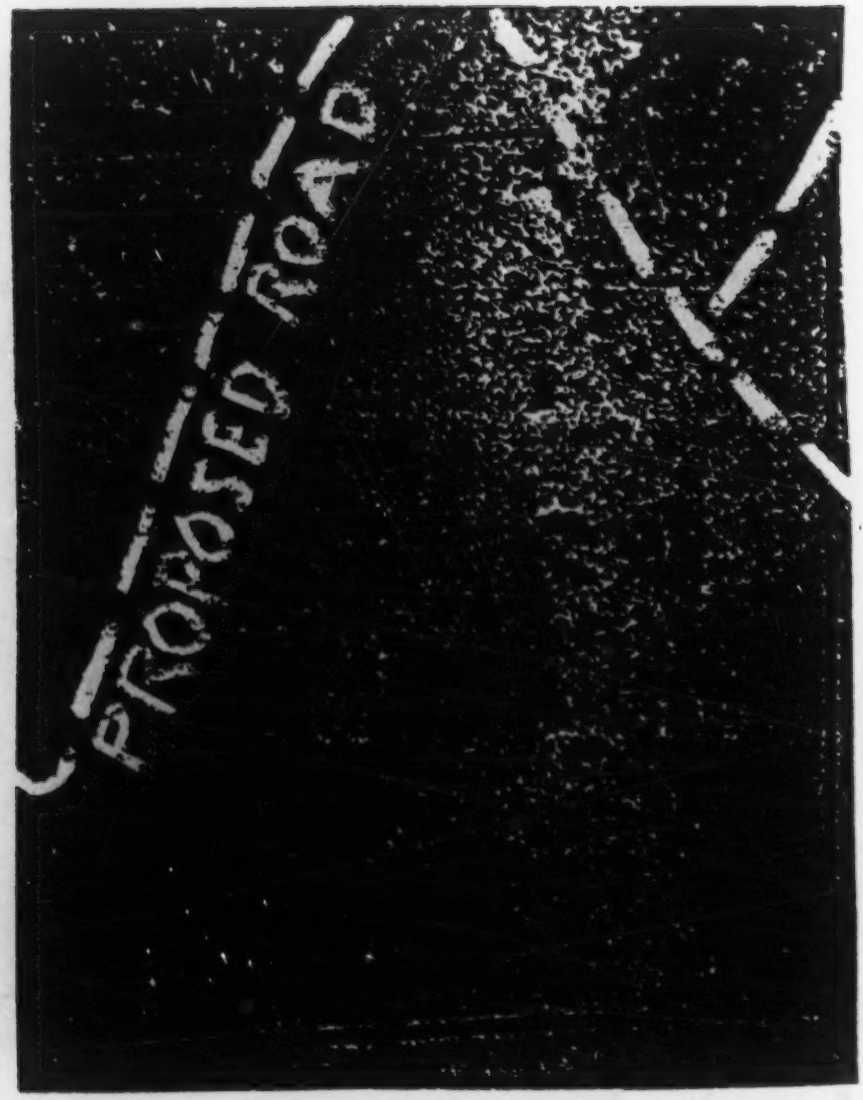
T29S R33E S2 OF SE4 SEC. 11

Photo. Date:4-25-70



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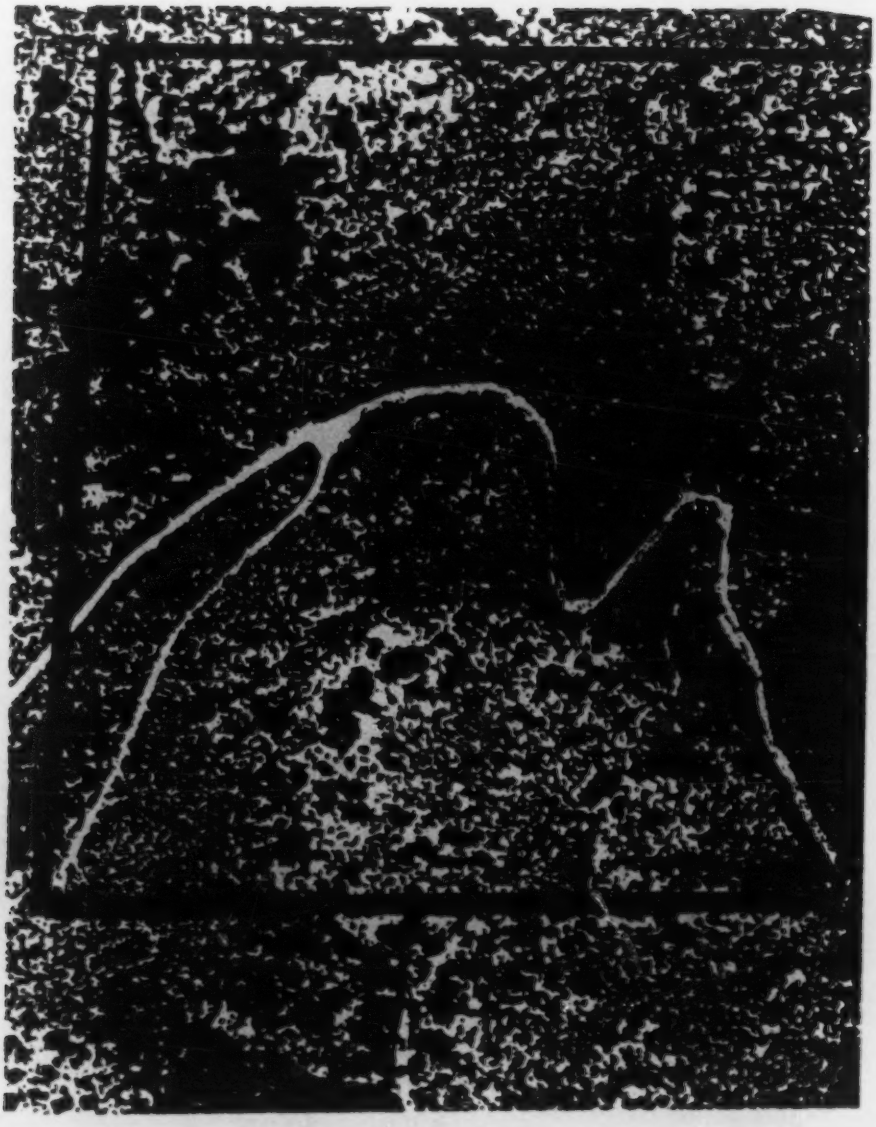

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T29S R33E S2 OF SE4 SEC. 11

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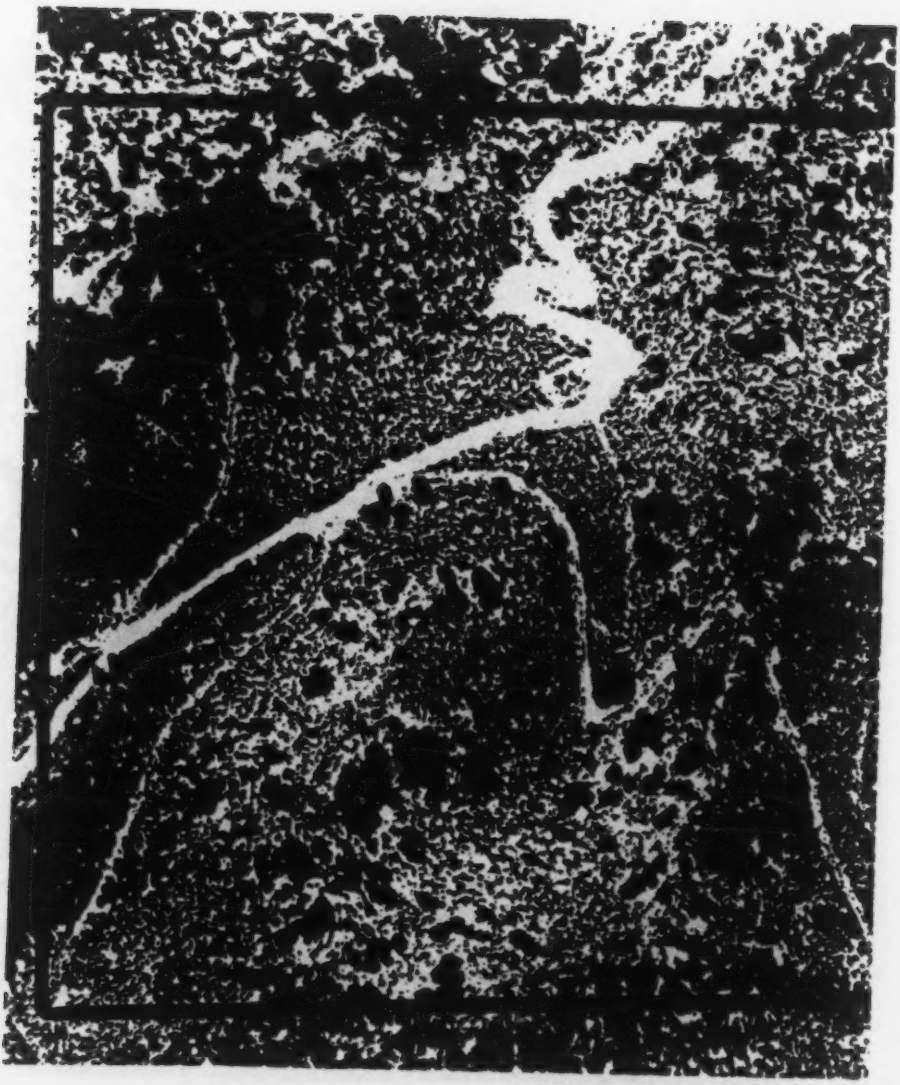

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